No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners challenge the constitutionality of a Civil War–era statute that prevents veterans from retaining counsel in benefit proceedings by imposing a $10 cap on attorneys' fees. On interlocutory appeal, this Court upheld the constitutionality of the fee limitation with respect to veterans' benefit claims in general and remanded for further consideration of its constitutionality as applied to complex claims in particular. On remand and after a two-month trial, the District Court held that the fee limitation violated procedural due process and First Amendment standards as applied to a class of veterans or their beneficiaries with claims based on exposure to ionizing radiation from atomic bomb testing and atomic bombs dropped at Hiroshima and Nagasaki. The Court of Appeals for the Ninth Circuit reversed.

Petitioners respectfully submit that this Court should grant *certiorari* to review the following questions presented by the Court of Appeals' opinion:

1. Upon this Court's remand to consider the constitutionality of the fee limitation as applied to complex claims, was the District Court free to hear evidence and to make further factual findings relating to these remanded claims? If so, was the Court of Appeals free to ignore those factual findings absent a determination that they were clearly erroneous?

2. Under this Court's standard for measuring procedural due process, plaintiffs must show the *risk* of an erroneous deprivation of a property interest and the *probable value* of additional safeguards. Did the Court of Appeals err by requiring petitioners to show instead:

> — not only a risk of erroneous deprivation, but also that a significant number of petitioners' claims had been wrongly decided?
>
> — not only the probable value of a lawyer's assistance, but also that lawyers are absolutely "necessary" to ensure procedural fairness?

3. Did the Court of Appeals err in treating selected excerpts of "legislative history" to unenacted statutes as supplanting the District Court's specific factual findings regarding the operation of the veterans' benefit claims system as applied to petitioners?

4. Did the Court of Appeals err by refusing to examine petitioners' First Amendment claims under a standard of strict scrutiny that requires that the fee limitation be narrowly tailored to serve a compelling governmental interest?

PARTIES TO THE PROCEEDINGS

All of the parties are listed in the caption. The parties before this Court and the Court of Appeals for the Ninth Circuit are identical except that the appropriate successors have been substituted for defendant public officers named in their official capacity, pursuant to Supreme Court 35.3.[1] None of the parties have parent companies or non-wholly owned subsidiaries.

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[1] Albert R. Maxwell, one of the original named plaintiffs, died prior to trial; his estate is not party to this action.

In addition, the following twelve organizations have expressed their support for this Petition and their desire to file *amicus* briefs should the Supreme Court grant *certiorari* in this matter: *Colorado Agent Orange–Atomic Veterans Coalition* (Evergreen, Colorado); *Veterans Due Process, Inc.* (Portland, Oregon); *National Association of Atomic Veterans* (Salem, Massachusetts); *Vietnam Veterans of America, Inc.* (Washington, D.C.); *American Trial Lawyers Association* (Washington, D.C.); *Swords to Plowshares Veterans Rights Organization* (San Francisco, California); *AMVETS Trinity Post 7-45* (Portland, Maine); *American Civil Liberties Union* (New York, New York); *Trial Lawyers for Public Justice* (Washington, D.C.); *Radiation Health Effects Public Interest Law Group (RADLAW)* (Wheaton, Maryland); *Military Family Support Network (Desert Storm)* (Buies Creek, North Carolina), *American Veterans Committee* (Washington, D.C.).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners National Association of Radiation Survivors ("NARS"), Reason F. Warehime, Doris J. Wilson, Dolores Clapp, Marthann J. Conner, and Kathryn L. Hinkle petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit is reported at 994 F.2d 583 (9th Cir. 1993). The

opinion of the District Court for the Northern District of California is reported at 778 F. Supp. 1096 (N.D. Cal. 1991), *amended* 782 F. Supp. 1392 (N.D. Cal. 1992). The earlier opinion of this Court is reported *sub nom. National Association of Radiation Survivors v. Walters*, 473 U.S. 305 (1985) (hereinafter *"Walters"*). All of these opinions are reproduced in the Appendix.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1992. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 18, 1993. (App. 148.) The jurisdiction of the federal courts in the first instance rested upon 28 U.S.C. § 1331. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the following constitutional provisions and statutes, which are set forth in full in the Appendix: Due Process Clause, U.S. Const. amend. V; Right to Petition Clause, U.S. Const. amend. I; 38 U.S.C. § 3404, limiting to $10 attorneys' fees in veterans' benefit proceedings; and 38 U.S.C. § 3405, imposing criminal penalties for violations of § 3404 (both prospectively repealed 1988).

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2 The District Court's opinion granting a preliminary injunction is reported at 589 F. Supp. 1302 (N.D. Cal. 1984). The District Court's opinion certifying the class after remand is reported at 111 F.R.D. 595 (N.D. Cal. 1986). The District Court's opinion sanctioning the government for destruction of documents and other violations is reported at 115 F.R.D. 543 (N.D. Cal. 1987).

The proposed findings of fact submitted to the District Court by the plaintiff class and named plaintiff Reason Warehime, respectively, were included in the Appendix to petitioners' Emergency Application for Stay Pending Review on *Certiorari* to Associate Justice Sandra Day O'Connor, filed July 23, 1993, and are available for review therein. Petitioners also intend to include them in any Joint Appendix filed if this Court grants *certiorari*. The District Court relied on many of these proposed findings of fact; they indicate the comprehensive and detailed scope of the record below.

STATEMENT

I. THIS COURT'S DECISION IN *WALTERS*

A. Direct Appeal of the Preliminary Injunction Ruling

This case has previously come before this Court, but in a substantially different form. In 1983, this action was filed by several disabled veterans and non-profit veterans' organizations. The original complaint contested the constitutionality of the fee limitation and accompanying criminal penalties, 38 U.S.C. §§ 3404 and 3405, on Fifth and First Amendment grounds, both facially and with respect to all types of service-connected death and disability ("SCDD") claims. After expedited discovery, plaintiffs moved for a preliminary injunction against enforcement of the fee limitation. The District Court granted the preliminary injunction, finding that plaintiffs were likely to succeed on the merits of their Fifth and First Amendment challenges. The government filed a direct appeal under since-repealed 28 U.S.C. § 1252.

In a split decision involving four separate opinions, this Court vacated the preliminary injunction and remanded for further proceedings. In the main opinion written by now-Chief Justice Rehnquist, six Justices upheld the fee limitation facially and, based on the limited record, with respect to SCDD claims in general.

Five Justices, however, agreed that the Court was leaving open a challenge to the constitutionality of the fee limitation as applied to complex claims. Justice O'Connor wrote a concurring opinion, which Justice Blackmun joined, explicitly recognizing remand of the as-applied challenge for complex claims. (App. 52-55.) In a dissenting opinion joined by Justice Marshall, Justice Brennan wrote that "a majority of the Court" did not reach the constitutionality of the fee limitation "as applied to particular categories of claims." (App. 72 at n.51.) In another dissenting opinion joined by Justices Marshall and Brennan, Justice Stevens stated outright that the fee limitation was unconstitutional. (App. 75-89.)

B. The Court's Main Opinion

In upholding the fee limitation facially and with respect to SCDD claims in general, Chief Justice Rehnquist applied the due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). (App. 38.) The *Mathews* balancing test weighs the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Chief Justice Rehnquist added that "'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" (App. 38.)

Applying the first *Mathews* factor, Chief Justice Rehnquist discussed the private interest which would be affected by the fee limitation. His opinion for the Court stated that SCDD benefits are not strictly need-based like welfare payments on which recipients depend for their daily subsistence. (App. 50.)

Continuing under the second *Mathews* factor, Chief Justice Rehnquist stated, "[i]t would take an extraordinarily strong showing" of the risk of error and probable value of attorneys to establish a due process violation. (App. 43.) He observed that even with evidence establishing the number of claimants who were denied benefits initially and on reconsideration, but awarded benefits on appeal, "it is [not] possible to quantify the 'erroneous deprivations' among the general class of rejected claimants." (App. 44.) The Chief Justice found it "fortunate to have statistics" concerning the probable value of attorneys. (App. 44.) These statistics showed veterans with *pro bono* counsel prevailed in 18.3% of all appeals, and veterans with volunteer service representatives prevailed in approxi-

mately 16% of all appeals (*id.*), a difference of about 14%.[3] Such a difference was "no such great disparity as to warrant" concluding that the fee limitation was unconstitutional. (App. 51.)

Finally, under the third *Mathews* factor, Chief Justice Rehnquist's opinion noted that "the oft-repeated congressional purpose" for the fee limitation was to prevent veterans from having to pay part of their SCDD benefits to attorneys. (App. 40.) The opinion concluded that this governmental interest was valid whether or not "paternalistic." (App. 40.)

Chief Justice Rehnquist acknowledged that there "are undoubtedly 'complex' cases pending before the VA," but observed that "neither the District Court's opinion nor any matter in the record to which our attention has been directed tells us more than this." (App. 46.) Thus, while attorneys "might be more of a factor in preventing error in such cases, ... on this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up." (App. 47.)

C. The Concurring and Dissenting Opinions

In her concurring opinion, Justice O'Connor made explicit many points which are implicit in the Court's main opinion. Justice O'Connor explained, with the agreement of a different majority, that *"the Court ... does not determine the merits of the appellee's individual 'as applied' claims."* (App. 54.)[4] She noted that plaintiffs had not brought a class action, and that the court below had not directed its findings or injunction to "a subclass of complex claims that by their nature require expert assistance." (App. 54.) Thus, "[o]n remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in

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3 The difference is calculated by dividing the difference between these two rates by the success rate for unrepresented claimants. Prior opinions have described the difference as 2%, calculating that figure by simple subtraction.

4 Unless otherwise indicated, all emphasis appearing in quotations has been added; deletion of internal quotes is not indicated.

this opinion." (App. 55.)[5] As importantly, Justice O'Connor stated that challenges brought by "identifiable groups ... remain open on remand." (App. 53.) Justice O'Connor clarified that to prevail, plaintiffs would need to show that there was "a 'group' with respect to which the process provided is '[in]sufficient for the large majority.'" (App. 53-54.) The group should be one "whose 'situation differs' in important respects from the typical [SCDD] claimant." (App. 54.)

In his dissenting opinion, Justice Brennan stated that this Court could not have addressed the merits of the as-applied challenge relating to complex claims, because the trial court had yet to rule on these claims. Like Justice O'Connor, Justice Brennan described the record below as only "partially developed." (App. 73.) He suggested that it was contradictory for the majority to reach any of the merits after only a preliminary injunction had been entered, while "excoriat[ing] the appellees and the District Court repeatedly for failing to muster sufficient evidence." (App. 74.)

Justice Stevens stated in his dissenting opinion that he would have struck down the fee limitation because it "impose[s] an unconstitutional restraint on individual liberty." (App. 76.) Justice Stevens observed that "[e]veryone agrees ... that there are at least some complicated cases in which the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency." (App. 75-76.) Furthermore, "[t]he fact that a lawyer's services are unnecessary in most cases, and might even be counterproductive in a few, does not justify a total prohibition on their participation." (App. 80.) Thus, lawyers "should be permitted in appropriate cases." (App. 81.)

D. First Amendment Issues

This Court also briefly discussed the veterans' First Amendment right to petition the government for redress of grievances. The Court reasoned that under its due process

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[5] Specifically, Justice O'Connor pointed to the claims of two individual plaintiffs which were difficult to evaluate on the preliminary record. (App. 54.)

analysis, veterans had an "opportunity" to "make a meaningful presentation." Because of that "opportunity," the First Amendment claim did not have "independent significance." (App. 51-52.) The Court distinguished two earlier cases that had recognized unions' and union members' right to retain and recommend counsel, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). The Court stated that those cases should not be "extend[ed]" to "cover the situation" of veterans. *Mine Workers* and *Railroad Trainmen* concerned the right of individuals and organizations to retain or recommend counsel in proceedings where counsel was already permitted, while this case presented individual interests in "best prosecuting a claim" where attorneys had been effectively prohibited. (App. 51.)

II. THE DISTRICT COURT'S PROCEEDINGS AND LEGISLATIVE CHANGES AFTER REMAND

A. Pre-Trial Proceedings and Trial

Following remand, the District Court permitted plaintiffs to amend their complaint to bring a challenge on behalf of a particular class with complex claims. Thereafter, the District Court certified the class of "all past, present, and future ionizing radiation claimants who have, or will have, some form of 'active' claim relating to SCDD benefits before the VA." (App. 92.)[6] On the government's motion, the District Court dismissed the facial challenge to the fee limitation based upon

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[6] In certifying the class, the District Court relied on Justice O'Connor's concurring opinion. As the District Court explained, "the heart of plaintiff's constitutional challenge" on remand was "whether ionizing radiation claims are, by their very nature, so complex that the assistance of an attorney is necessary to ensure a fair and constitutionally adequate hearing." (App. 98.)

Plaintiff class members are referred to as "IR Claimants," an abbreviation of "Ionizing Radiation Claimants." Their claims are referred to as "IR Claims."

Walters, leaving intact the named plaintiffs' challenge to the fee limitation as applied to IR Claims. (*See* App. 92.)[7]

Following class certification, the parties engaged in extensive discovery concerning all aspects of the IR Claims adjudication process. That discovery included the production of more than 2,000,000 pages of documents by the Veterans Administration ("VA")[8] and numerous other federal agencies. Discovery also included 71 depositions, among them officials in every VA unit which plays a role in adjudicating IR Claims; Defense Nuclear Agency ("DNA") officials responsible for radiation dose estimates; and volunteer service representatives of major veterans organizations.

A year prior to trial, petitioners learned from an anonymous source that the government was shredding documents which had been requested in discovery. The District Court issued a temporary restraining order to prevent further destruction of evidence; petitioners were able to secure the last 25 boxes at the shredding facility. The District Court then held an evidentiary hearing and found the VA guilty of multiple violations of Federal Rules of Civil Procedure 11 and 26. The court awarded sanctions in the amount of $105,000, and later awarded additional sanctions for further failure to comply with court orders and the Federal Rules. *See NARS v. Derwinski*, 115 F.R.D. 543 (N.D. Cal. 1986).

On September 8, 1987, the District Court began a two-month trial. Dozens of witnesses testified, including individual IR Claimants, VA officials responsible for handling IR Claims, and fifteen independent experts in the fields of medicine, science, and administrative law. In addition, the

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7 The District Court rejected the government's argument that the named plaintiffs' claims were atypical because "this is not an action for benefits—it is an action challenging the constitutionality of the fee limitation as applied to all ionizing radiation claimants." (App. 100.) That the named plaintiffs did not prevail before the VA was irrelevant because "the whole point of this litigation is that plaintiffs contend they need the assistance of counsel in order to adequately prove their IR Claims." (App. 101.)

8 In 1991, the Veterans Administration became the Department of Veterans Affairs ("DVA"). *See* 39 U.S.C. § 301.

parties introduced 1500 trial exhibits and stipulated to the submission of 75,000 pages of deposition testimony.

B. Legislative Changes After Trial

After trial and while the matter was under submission, Congress prospectively repealed the $10 fee limitation as part of an overhaul of the VA adjudication system, highlighted by the creation of the United States Court of Veterans Appeals. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687 § 104 (1988), permits veterans to hire attorneys to reopen initial decisions before a regional office or to bring an appeal to the Court of Veterans Appeals, 38 U.S.C. § 5904(c)(1), and permits reasonable attorneys' fees or a contingency fee not to exceed 20%. 38 U.S.C. § 5904(c)(2) and (d)(1). In addition, regulations promulgated under the VJRA permit veterans groups to hire attorneys at all stages of the proceedings. 38 C.F.R. § 14.634(a).[9] However, the VJRA excluded pre-existing appeals and resolved claims from its scope, thus leaving out the class of IR Claimants.[10]

C. The District Court's Decision

On January 29, 1992, the District Court issued its amended findings of fact and conclusions of law, holding that the $10 fee limitation was unconstitutional as applied to IR Claimants on both due process and First Amendment grounds. On March 26, 1992, the District Court entered a stipulated judgment establishing procedures for readjudicating IR Claims with attorney assistance, which does not extend to any claims covered by the VJRA.

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9 Appeals are permitted from the Court of Veterans Appeals to the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. § 7292.

10 The VJRA was designed to operate prospectively to permit the Court of Veterans Appeals enough time to begin operations and enable it to build its docket slowly. *See Prenzler v. Derwinski*, 928 F.2d 392 (Fed. Cir. 1992); 134 Cong. Record S16650 (Oct. 18, 1988). There was no intention to exclude any particular group of veterans. Thus, veterans who receive an initial denial of an ionizing radiation claim after the operative date of the VJRA are free to retain counsel.

1. Due Process Findings

The District Court began its due process analysis under *Mathews* by considering the private interest affected by the official action. As shown by statistics documenting their average annual family income and medical expenses, IR Claimants are poor, and "a substantial majority ... would rely primarily on SCDD benefits for their basic maintenance and support." (App. 115.)

The District Court next considered the risk of error and the probable value of attorneys. The court concluded that IR Claimants had made the required "extraordinarily strong showing," referred to in this Court's prior decision. (App. 142.) On the basis of a wealth of evidence presented by both sides, the District Court found that IR Claimants constituted a group that differed significantly from veterans seeking other SCDD benefits. The court's conclusion was based on six categories of fact findings:

The Claims Development Process for IR Claims Specifically. The District Court found the IR Claims development process "is far more detailed and complex than that for other SCDD claims" because of the complexity of the applicable substantive and procedural rules and regulations.[11] (App. 117.) These rules and regulations were promulgated pursuant to the mandate of the "Veterans' Dioxin and Radiation Exposure Compensation Standards Act," Pub. L. No. 98-542 (1984). (App. 116.) The rules and regulations applicable to IR

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[11] IR Claims are governed by the rules and regulations for SCDD claims generally and also rules and regulations directed to IR Claims specifically. The general rules and regulations include: the statutes; VA regulations; VA General Counsel opinions, which are not digested; BVA decisions; VA circulars; and agency manuals such as the VA Adjudication Manual, VA Program Guide, MBVA Manual, and Field Appellate Procedure Manual. (App. 115-16.) The specific rules and regulations include the complex provisions of 38 C.F.R. § 3.311b, which, among other things, sets forth three prerequisites for an IR Claim: (a) that the veteran was exposed to ionizing radiation as a result of atmospheric atomic bomb testing, the occupation of Hiroshima or Nagasaki, or other activities; (b) that the veteran developed one of 17 enumerated diseases; and (c) that the disease became manifest within a particular time period. (App. 116-17.)

Claims involve initial screening of IR Claims by VA regional offices;[12] soliciting additional information from IR Claimants;[13] preparing radiation dose estimates in several steps;[14] multiple layers of internal agency review;[15] and possible appeal.[16]

Medical Issues Related to IR Claims. The District Court found that "the proper presentation and adjudication of IR Claims will often require the marshalling of expert medical opinion and testimony." (App. 123.) The court made numerous findings concerning the difficulty of determining cancer

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[12] The VA regional office initially determines whether a submitted claim meets the three prerequisites of 38 C.F.R. § 3.311b. (App. 117.)

[13] Upon a finding that the applicant has satisfied § 3.311(b), the regional office sends a pattern letter, which requests more information than for SCDD claims generally. (App. 117.)

[14] The regional offices refer claims to the Defense Nuclear Agency ("DNA") for a radiation dose estimate pursuant to 32 C.F.R. § 218.1 *et seq.* If the claimant obtains a dose estimate at least twice the DNA dose estimate, the regional office will refer the case to an independent expert for dose reconciliation. (App. 117.)

[15] Following development of the dose estimate, the file is submitted to the Administrative Review Staff of the Compensation and Pension Service ("CPS"), a step usually not taken with other SCDD claims. The CPS makes a recommendation for allowance or denial of the claim, which the regional office must take into consideration. The regional office will issue a Notice of Decision with its rating decision on disability, based on a complex schedule with anatomical data and other criteria. (App. 118.)

[16] If the claim is denied, the IR Claimant may file a Notice of Disagreement ("NOD"), within one year. If an NOD is timely filed, the regional office will reconsider its decision. If the denial is affirmed, the regional office issues a Statement of the Case ("SOC") with the basis for its decision. The IR Claimant then may file an appeal, within sixty days of issuance of the SOC or the remainder of one year from mailing of the Notice of Decision. (App. 118.)

The claimant's appeal is reviewed by the BVA. If the BVA denies the appeal, an IR Claimant has no recourse to judicial review under the VJRA. 38 U.S.C. § 511. The IR Claimant may move to reconsider when there has been an obvious legal or factual error or with new evidence, and may reopen the claim at the regional office level. (App. 118.) The claimant is entitled to a hearing upon request at any time on any issue involved in a claim, and is allowed to introduce evidence throughout the proceedings. (App. 119.)

causation; the difficulty of determining whether the veteran's condition is covered by the disease classification regulations; the fact that 49% of IR Claimants suffer from a disease not listed in the regulations; the lack of standards for assessing the time of manifestation for a disease; and difficulties concerning the accuracy of the radioepidemiological tables used by the VA. (App. 119-23.)

Scientific Issues Related to IR Claims. The District Court found that "the scientific issues involved in IR Claims are extremely complex and beyond the capacity of a lay-claimant to understand." (App. 123.) The court found considerable disagreement within the scientific community over calculating radiation dose estimates. The court further found that the VA's generic dose reconstructions were less accurate than individualized dose reconstructions. (App. 126-27.)

Factual Development of IR Claims. The District Court found that "properly developing the facts underlying [IR Claims] is an extremely intricate undertaking." (App. 128.) There is "[a] plethora of information" which is needed to develop an IR Claim, including: the location of the veteran at the time of explosion; the activities undertaken at the time; the type of bomb; time of exposure; length of exposure; and presence or absence of protective shielding. (App. 128.) Obtaining much of the necessary information is difficult, requiring use of the Freedom of Information Act, declassification through the Secrecy Act, and use of the Privacy Act. (App. 128-29.)

Adversarial Nature of IR Claims Processing. The District Court found that "[n]o evidence was presented at trial which supports the notion that the supposedly informal and non-adversarial nature of the VA adjudication system for IR Claims serves as a safeguard for claimants." (App. 130-31.) Instead, the court made findings that the presumptions which should have protected IR Claimants were "illusory."[17] The VA per-

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[17] The presumptions are illusory because the manifestation period, which must be shown to use the presumption of 38 C.F.R. § 3.309, itself is difficult to prove; the presumptive periods have been misapplied; and the threshold requirements of 38 C.F.R. § 3.311b have been used to deny claims despite the presumption. (App. 129-30.)

formed very little factual development of IR Claims. For example, in a random selection of 674 IR Claims, the VA failed to obtain a dose estimate in 59% of the cases and also failed to conduct a physical exam in 48%.[18] (App. 131.) The VA actively discouraged IR Claimants from invoking their right to a hearing, and hearings were held in fewer than 6% of IR Claims.[19] (App. 132-33.)

Inadequacy of Service Representatives in Handling IR Claims. The District Court found that the availability of volunteer service representatives does not provide an adequate safeguard for IR Claims. They have a "'crushing'" caseload, are not trained in handling IR Claims, do little factual development, rarely request hearings, frequently meet with the claimant for the first time only an hour prior to the hearing, often waive the claimants' rights, and often prepare inadequate briefs. (App. 133-35.) The court noted that service representatives were adequate for more routine SCDD claims. (App. 133.)

In the face of these and other demonstrated shortcomings in the system, the District Court found that attorneys were crucial to proper presentation of IR Claims. Specifically, the District Court found that IR Claims "involve[] a wide variety of tasks for which attorneys are trained and particularly well-suited." Among those tasks are the use of the FOIA, the Secrecy Act, and the Privacy Act to obtain government documents; claim development; compliance with procedural requirements; development and use of expert testimony; legal research and writing; and asserting legal challenges to mistaken agency actions. (App. 135-36.) The probable value of attorneys was further demonstrated by proof that "IR Claimants who employ attorneys have had significantly higher success rates than those relying on volunteer service representatives."

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[18] This problem is compounded by an institutional incentive to underprepare IR Claims because the VA's internal "work product" schedule provides no additional work credit for IR Claims. (App. 131.)

[19] Hearings are especially important because claimants who have hearings have a substantially higher success rate than claimants who do not. (App. 132-33.)

(App. 137.) In fact, the evidence showed that the IR Claimants represented by counsel have a 2400% higher success rate than those proceeding with service representatives.[20]

Finally, the District Court weighed the asserted governmental interest in adhering to the fee limitation. The court found that whatever the merits of the fee limitation previously, it had none after the fee limitation was repealed prospectively by the VJRA and paid counsel were permitted in the system. There was "no rational manner in which the government interest ... could be one thing for claimants who filed their NOD prior to November 18, 1988 and another for those who file after." (App. 141.)

2. First Amendment Findings

The District Court also held that the fee limitation infringed upon petitioners' First Amendment right to petition the government for redress. The District Court recognized that the First Amendment protects both individual and collective activity. (App. 144-45.) In analyzing the First Amendment issue, the District Court relied on two cases decided after this Court's earlier decision in this action. (App. 146, *citing Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Meyer v. Grant*, 496 U.S. 414 (1990).) The District Court held that these cases extended to individual activity First Amendment protection previously limited to collective activity. Under these cases, petitioners possessed an interest in paying another to assist them in petitioning the government for redress. (App. 146.) Given that interest, the fee limitation would have to serve a compelling governmental interest and be narrowly tailored. (App. 146.) The fee limitation did not serve a compelling governmental interest because the VJRA undermined its legitimacy; the fee limitation was not narrowly tailored because other measures could be used to protect IR Claimants from unscrupulous attorneys or to create informality in the IR Claims adjudication process. (App. 146-47.)

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[20] The difference is calculated in the same manner described in note 3, above. Evidence at trial showed that the percentage of IR Claimants who succeed with counsel is 16.13%; the percentage of IR Claimants who succeed without counsel is .64%. (*See* App. 20.)

III. THE NINTH CIRCUIT'S OPINION

On November 24, 1992, the Ninth Circuit reversed the District Court, treating *Walters* as determinative of the as-applied claims, notwithstanding this Court's remand. The Ninth Circuit reasoned that "the district court's finding regarding the complexity of law and procedures of IR Claims is not sufficient to establish a due process violation." (App. 17.) In so holding, the Ninth Circuit relied heavily on this Court's decision reversing the preliminary injunction on the facial claim. For example, the Ninth Circuit stated that this Court had rejected the district court's finding that the SCDD benefit process in general was complex, because that finding was based on a discussion of that process in the abstract. (App. 16.) The Ninth Circuit also stated that only by showing that a "significant number" of IR Claimants were wrongly denied benefits due to the medical and scientific complexities of their claims, could plaintiffs show that IR Claims are "materially different from all SCDD claims controlled by *Walters*." (App. 17.) The Ninth Circuit cited Chief Justice Rehnquist's opinion in *Walters* for the proposition that "'process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them.'" (App. 15.)

Guided by its restrictive interpretation of *Walters*, the Ninth Circuit held that the District Court had erred in rejecting the governmental interest in the fee limitation. The Ninth Circuit stated that this Court had found "the introduction of lawyers into administrative proceedings is likely to have serious adverse consequences." (App. 11.) Accordingly, the District Court's "dismissal of the potentially detrimental effects of increasing the number of lawyers appearing before the VA severely discounts the Supreme Court's finding in *Walters*." (App. 12.) Even though Congress had largely eliminated the fee limitation in the VJRA, the Ninth Circuit inferred that the VJRA "reaffirmed the government's interest in the fee limitation." (App. 9.)

More fundamentally, the Ninth Circuit held that the District Court had improperly evaluated the risk of error and the probable value of attorneys. As to the risk of error, the Ninth Circuit held that plaintiffs failed to show the fee limita-

tion "has produced or is substantially likely to produce a significant number of wrongful denials of claims." (App. 15.) As the Ninth Circuit explained, the risk of error would be established only if "a significant number of IR Claimants have been denied benefits because they were unable to follow procedures necessary to pursue their claims"; even then, IR Claimants would have to show that they were denied benefits "due to the medical and scientific complexities of IR Claims." (App. 17.) Viewed against this standard, the District Court's extensive fact findings regarding procedural, medical, and scientific complexity of the IR Claims adjudication process were inadequate. In evidentiary terms, IR Claimants needed to show "how frequently such errors actually occur in the VA system." (App. 18.)

As to the probable value of attorneys, the Ninth Circuit held that plaintiffs failed to show that attorneys were strictly "*necessary*." (App. 20.) As the Ninth Circuit explained, "the issue is whether the presence of attorneys would 'sharply diminish' the probability of error." (App. 21.) The Ninth Circuit reasoned, however, that this Court had already found that attorneys were not necessary for presenting SCDD claims. (App. 20.) Thus, even though the Ninth Circuit accepted the District Court's findings concerning the "many tasks for which attorneys particularly are well suited," those findings were not sufficient to show the probable value of attorneys. (App. 20.) Moreover, the Ninth Circuit dismissed the District Court's finding that IR Claimants represented by lawyers were significantly more likely to prevail than claimants not represented by counsel. Instead, the Ninth Circuit deferred to the government's speculative argument that IR Claimants with lawyers might have been more successful because they had stronger claims than the IR Claimants without lawyers. (App. 20.)

Finally, the Ninth Circuit held that because the fee limitation did not violate due process, it also did not infringe upon any First Amendment right. (App. 22.) The Ninth Circuit acknowledged that the First Amendment protects only collective activity taken to achieve meaningful access to the courts (App. 21), but questioned whether individuals receive similar

protection. Further, it questioned whether meaningful access to administrative agencies is constitutionally equivalent to meaningful access to courts. (App. 22.)

REASONS FOR GRANTING THE PETITION

If the Court of Appeals' decision is permitted to stand, a group of more than 10,000 disabled veterans and their families will be denied an opportunity to seek veterans' benefits with the aid of counsel.[21] These veterans are survivors (or in many instances victims) of some of the most hazardous duties in the military service. They have suffered from cancer and other serious diseases as a direct result of exposure to ionizing radiation from atomic bombs. These veterans and their families are unable to hire attorneys, even though their veterans' benefits claims are especially complex and cannot be prepared adequately and fully without attorney assistance.[22] Despite the passage of legislation that disapproved of the antebellum fee limitation and abolished it for other veterans with claims for veterans' benefits, the remaining class of IR claimants still cannot hire lawyers. As a consequence, many veterans and their families with meritorious claims will never receive the veterans' benefits to which they are entitled.

The Court of Appeals' decision will work this injustice because it failed to follow this Court's mandate in *Walters*, applied a heightened and constitutionally unsound standard for procedural due process, accepted inappropriate indicia of legislative history, and refused to recognize the veterans' First Amendment right to petition the government for redress. If followed by other courts, the Court of Appeals' decision threatens to work an injustice in other cases as well. This Court should grant *certiorari* to determine whether the Court

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21 Within days of entry of the Ninth Circuit mandate, the DVA suspended the ongoing readjudication of IR Claims, which had been initiated with attorney assistance.

22 This Court has accepted that the fee limitation renders it impossible to hire an attorney. *See United States Department of Labor v. Triplett*, 494 U.S. 715, 721-22 (1990) (*discussing Walters*).

of Appeals has incorrectly reformulated standards for assessing deprivations of due process and First Amendment rights.

I. THE NINTH CIRCUIT MISREAD *WALTERS* AS BEING DISPOSITIVE OF PETITIONERS' AS-APPLIED CHALLENGE ON REMAND

The District Court followed this Court's mandate, but the Ninth Circuit failed to do so. In reversing, the Ninth Circuit adopted the logical fallacy that this Court's prior description of SCDD claims in general governed the unique issues raised by IR Claims in particular. The Ninth Circuit treated this Court's decision in *Walters* as barring the as-applied challenge brought by IR Claimants, and decided the fact-intensive, as-applied challenge without reference to the record or deference to the District Court's factual findings. In so doing, the Ninth Circuit ignored important differences between the case as it now stands and as it stood when last reviewed by this Court. *See Utah Pub. Service Comm'n v. El Paso Nat'l Gas Co.*, 395 U.S. 464 (1969) (vacating antitrust decree for failure to follow mandate on remand).

When last before this Court, the case involved an appeal of a preliminary injunction. This Court had before it only an incomplete record, and not the comprehensive and detailed fact findings developed after remand. Moreover, this Court's earlier decision considered the challenge to the fee limitation facially and with respect to all SCDD claims in general. The Court neither reached nor resolved the challenge to the fee limitation as applied to complex claims, but instead remanded for further proceedings. Thus, this Court's *Walters* decision not merely permits but affirmatively requires consideration of the fee limitation as applied to IR Claims.

The District Court, in permitting plaintiffs to proceed on behalf of a class of veterans or their beneficiaries with especially complex claims, correctly focused on substantive and procedural issues unique to IR Claims. The District Court made a detailed examination of: (1) the claims development process for IR Claims specifically; (2) medical issues related to IR Claims; (3) scientific issues related to IR Claims; (4) factual development of IR Claims; (5) the adversarial nature of IR

Claims processing; and (6) the inadequacy of service representatives in handling IR Claims. In contrast to the necessarily limited factual findings previously reviewed by this Court at the preliminary injunction stage, the District Court made extensive factual findings on the basis of evidence received during a two-month trial. Pursuant to this Court's mandate, the District Court found that petitioners had made an extraordinarily strong showing of the risk of error and the probable value of attorneys. (App. 142.)

The Ninth Circuit erred by treating this Court's discussion in *Walters* of the SCDD claims process as supplanting the District Court's factual findings regarding IR Claims on remand and after trial. Indeed, the Ninth Circuit's opinion is remarkable for the absence of references to the voluminous record developed on remand.

Review of the Court of Appeals' opinion will confirm that the Ninth Circuit incorrectly viewed *Walters* as foreclosing an as-applied challenge by IR Claimants. For example, the Ninth Circuit observed that "[i]n describing the procedure for processing *[SCDD] claims*, the Supreme Court in *Walters* noted that '[t]he process is designed to function throughout with a high degree of informality and solicitude for the claimant.'" (App. 5.) The Ninth Circuit further stated, "[i]n *Walters*, the Supreme Court specifically rejected the district court's finding at the preliminary injunction stage that *the SCDD benefits process* was complex because that finding was based on a discussion of that process in the abstract." (App. 16.) On this basis, the Ninth Circuit concluded, "[t]he Supreme Court's reasoning in *Walters* indicates that the district court's finding regarding the complexity of law and procedures of *IR Claims* is not sufficient to establish a due process violation." (App. 17.)

Similarly, in rejecting the District Court's finding regarding the probable value of attorneys, the Ninth Circuit stated that *Walters* contained a finding that lawyers are not "*necessary*" to assist SCDD claimants. (App. 20, original emphasis.) The Ninth Circuit also stated that its conclusions about the negative impact of lawyers were compelled by "a finding in *Walters*." (App. 11.)

Another indication of the Ninth Circuit's disregard of this Court's mandate on remand is the absence of discussion of the as-applied challenge brought by individual IR Claimants, such as Reason Warehime. Justice O'Connor specifically noted the claims of individual veterans who were named plaintiffs, and remanded for consideration of their claims. (App. 54.) On remand, the District Court found that the VA had inadequately adjudicated Mr. Warehime's claim (App. 129), after "an almost interminable string of lengthy delays, poor fact development and other forms of agency inaction and neglect which are both unjustified and clearly not in the claimant's interest." (App. 133.)

In effect, the Ninth Circuit has nullified this Court's remand. If this Court had already found that the IR Claims process was not complex, that lawyers were not necessary, and that introduction of lawyers into the system would have a negative impact, then there would have been no reason to remand. Under the Ninth Circuit's view of *Walters*, there could be no conceivable evidentiary showing that would establish a due process violation for any group of complex claims. That five Justices voted to remand confirms that the Ninth Circuit erred in viewing *Walters* as foreclosing petitioners' as-applied challenge.

The present petition would have less merit if the Ninth Circuit had considered the District Court's factual findings and found them clearly erroneous. That the Ninth Circuit has ignored those factual findings, in and of itself warrants this Court's review. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).[23]

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[23] This Court's description of the Court of Appeals' approach in *Icicle Seafoods* equally applies here: "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own." *Id.* at 714.

II. THE NINTH CIRCUIT IMPROPERLY MODIFIED THE *MATHEWS* TEST FOR PROCEDURAL DUE PROCESS

Although the Ninth Circuit purports to follow the *Mathews* balancing test for determining whether a statute violates procedural due process, it has altered significant elements of the test in applying it to this case. Under *Mathews*, petitioners were required to show the risk of erroneous deprivation as a result of the fee limitation, and the "probable value" of attorneys. *Mathews*, 424 U.S. at 335. The Ninth Circuit, however, required proof not only of the risk of an erroneous deprivation, but of an *actual error*; likewise, the Ninth Circuit required proof not only of the probable value of attorneys, but that attorneys were *absolutely necessary*. The Ninth Circuit's restrictive reformulation of the *Mathews* balancing test has wide-ranging implications for petitioners and other citizens raising due process challenges, which warrant this Court's review.

A. The Risk of Erroneous Deprivation

The Ninth Circuit improperly required a showing that the fee limitation in fact resulted in erroneous deprivations of veterans' benefits. As the Ninth Circuit explained, it is necessary that "a significant number of IR Claims have been denied" due to procedural, medical, and scientific complexities. (App. 17.) The opinion includes repeated statements to the effect that IR Claimants would need to show "how frequently such errors actually occur in the VA system," and how the fee limitation "has produced or is substantially likely to produce a significant number of wrongful denials of claims." (App. 18, 15.) Thus, under the Ninth Circuit's view, IR Claimants cannot prevail even by showing, as the District Court found, "the risk of erroneous deprivation" through extreme complexity and repeated errors in the operation of the IR Claims system itself. (App. 135.)

The vice of the Ninth Circuit's analysis is that it confuses the due process challenge to the fee limitation with the merits of the IR Claimants' underlying veterans' benefit claims. Whereas the *Mathews* test focuses on process, not outcomes, the Ninth Circuit's requirement of an actual deprivation

premises a due process challenge on proof of the merits of plaintiffs' claims. As shown by this case, even specific proof of and findings regarding substantive and procedural complexity in the IR Claims adjudication process, the high risk of erroneous deprivation, and the disparity in results for IR Claimants with and without counsel, will not suffice to establish a due process violation. There is little else an IR Claimant or any other due process challenger could show, short of establishing the merits of his or her underlying case.[24]

IR Claimants who were able to show success on the merits would not need to bring a constitutional challenge and would not need the assistance of an attorney. Of course, a litigant who was able to show an erroneous denial of a benefit claim would have an especially compelling case. That such a showing would be sufficient does not make it necessary. Especially on a class-wide basis, proof of the risk of erroneous deprivation of benefits need not and often cannot be premised on proof of error in individual claims. Even upon a showing of actual error, the due process analysis would still require a causal connection—that the fee limitation and medical and scientific complexities of IR Claims, rather than unrelated factors, led to the actual deprivation. It is unclear how many erroneous deprivations would be required to justify relief on behalf of a class of 10,000 IR Claimants.

Carried to its logical conclusion, the Ninth Circuit's opinion would require petitioners to show that a large majority of all claims were *wrongly* decided. Nothing in *Walters* suggests,

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[24] For the same reasons, the Ninth Circuit's alternative formulation of a "substantial likelihood of erroneous deprivation" is superfluous. If something short of proof of an actual deprivation would show the substantial likelihood of erroneous deprivation, it would be exactly what IR Claimants showed— procedural and substantive complexity, the high risk of erroneous deprivation, and the disparity in results for IR Claimants with and without counsel.

let alone justifies, such a radical transformation of the *Mathews* test.[25]

B. The Probable Value of Attorneys

Even worse, the Ninth Circuit rejected the *Mathews* factor of the "probable value" of attorney assistance to IR Claimants. Instead, the Ninth Circuit required a showing that attorneys would be strictly "*necessary*." (App. 20, original emphasis.)

The Ninth Circuit apparently accepted the District Court's factual finding that "IR Claims present many tasks for which attorneys are particularly well-suited." (App. 20.) However, the Ninth Circuit explained that "the issue is whether the presence of attorneys would 'sharply diminish' the probability of error." (App. 21.) Thus, the Ninth Circuit rejected petitioners' showing of a 2400% disparity between claims handled with and without attorney assistance, which expert testimony established was statistically significant. According to the Ninth Circuit, the 2400% disparity in success rates between represented and unrepresented claimants would be meaning-

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[25] In reformulating the *Mathews* balancing test, the Ninth Circuit cited *Walters* for the proposition that "process which is sufficient for a large majority of a group of claims is by constitutional definition sufficient for all of them." (App. 15.) The Ninth Circuit incorrectly reads this language as supporting its requirement of an actual deprivation. This interpretation is faulty because the *Walters* Court, and *Parham v. J.R.*, 442 U.S. 584, 617 (1979), on which it relied, were restating one of the principles contained in *Mathews*, namely that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." (App. 47-48.) The references in *Walters* and *Parham* to a "large majority of a group of claims," far from restricting the scope of due process challenges, were meant to enlarge it. As Justice O'Connor explained in her concurring opinion in *Walters*, even where process was sufficient for a large majority of one group of claims, it might not be sufficient for a large majority of a different group of claims, "whose 'situation differs' in important respects." (App. 54.) Likewise, in *Parham*, this Court held that Georgia's procedures for commitment of minor children to mental health institutions were not unconstitutional *per se*, but expressly left open a challenge as applied to individual cases. *Parham*, 442 U.S. at 617. *Parham* also left open challenges on behalf of a class of children who were wards of the state, who, the Court noted, had cases that may have differed from those of other children. *Id.* at 619.

ful only if the relative merits of the cases, successful and unsuccessful, were compared to ensure that attorneys had not selected the strongest ones.[26] Such an analysis cannot be performed without examining all claims asserted on behalf of thousands of class members as if they had been prepared adequately and fully; that is, as if they had been prepared with attorney assistance. Thus, the Ninth Circuit test requires that benefit claimants challenging a statute show what the outcomes in particular cases would be if the statute were struck down.

Like the requirement of an actual deprivation, the requirement that attorneys are strictly necessary conflicts with *Mathews*. While the Ninth Circuit required an empirical showing of necessity, *Mathews* envisioned a balancing test with a broader focus on the probable value of additional safeguards.

Here, petitioners presented compelling evidence and the District Court made factual findings concerning substantive and procedural complexity in the IR Claims adjudication process, the risk of erroneous deprivation, and the many tasks for which lawyers are well-suited. There is no dispute that IR Claims are difficult to establish, that the success rate generally is low, that the rules and regulations are complex, and that retained counsel can make the difference between a futile and successful claim. This showing, coupled with the gross disparity in success rates between represented and unrepresented claimants, demonstrated the "probable value" of attorneys, as required under *Mathews*.

The Ninth Circuit read *Mathews* to require that litigants produce an empirical showing of the benefit of additional safeguards. That was error for the very good reason that it would be an impossible requirement to satisfy. IR Claimants

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[26] Ignoring the District Court's finding based upon expert testimony, the Ninth Circuit substituted its own speculative findings that petitioners' statistical study should be discounted because attorneys might have selected the better cases. (*See* App. 20.) The District Court properly rejected that unwarranted suggestion for obvious reasons—attorneys working for $10 have little incentive to "cherry-pick" their cases.

challenged the constitutionality of the fee limitation on the ground that they needed lawyers to present their claims successfully. Borrowing a page from Joseph Heller's *Catch-22*, the Ninth Circuit stands that challenge on its head: to be entitled to lawyers, IR Claimants must show that they would win their claims; but to win their claims, IR Claimants need lawyers.

III. THE NINTH CIRCUIT ERRED BY HOLDING THAT THE DISTRICT COURT'S FACTUAL FINDINGS WERE OVERRIDDEN BY ISOLATED AND UNRELIABLE INDICIA OF LEGISLATIVE HISTORY

The Ninth Circuit rejected the District Court's factual findings in favor of supposed Congressional findings regarding the veterans' benefit claim process. (App. 9-10, 16, 19.) In so doing, the Ninth Circuit abdicated its role in evaluating the constitutionality of the fee limitation. *See, e.g., Sable Communications of California v. Federal Communications Comm'n*, 492 U.S. 115, 129 (1989).

In analyzing the fee limitation, enacted more than a century ago, the Ninth Circuit considered legislative history to contemporary bills which were not passed. The Ninth Circuit cited a few remarks scattered in Congressional reports about the general "fairness" of the DVA system, not even for SCDD claims, but rather for all disability, education, pension and other benefits.[27] These remarks appear in reports to proposed bills concerning judicial review of DVA decisions. Neither report—House Report No. 963 and Senate Report No. 418—focused on IR Claims. Contrary to the Ninth Circuit's implication (App. 16), neither proposed bill was ever enacted. Accordingly, neither constitutes "legislative history of the

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[27] The Ninth Circuit cited a Senate Report which referred to a "strong and vital system of veterans service officers who provide excellent representation at no cost to claimants." S. Rep. No. 418, 100th Cong., 2d Sess. at 64. The Ninth Circuit also cited a House Report containing excerpts of comments by an academician who characterizes the DVA system generally as "fair" and "permeable on a daily and individual basis by service organizations and state agencies who represent veterans." H.R. Rep. No. 963 at 5807-08. These remarks can hardly be characterized as "Congressional findings"; they are neither fact-specific nor supported by any evidence concerning the adequacy of volunteer service representatives in complex IR Claims.

VJRA." As this Court has cautioned, because "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," it is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).[28]

Moreover, despite its reliance on Congressional findings, the Ninth Circuit overlooked the only Congressional findings expressly focused on IR Claims, which appear in the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542. The Act required the VA to promulgate consistent rules and regulations for handling IR Claims and Agent Orange Claims. In passing it, Congress found that radiation-related claims, "especially those involving health effects with long latency periods[,] present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service." Pub. L. 98-542 § 2 (12).[29]

Finally, the Ninth Circuit misconstrues the impact of the VJRA on petitioners' claims. The VJRA lifted the fee limitation prospectively: veterans may now hire attorneys after denial of their SCDD claims, and pay a reasonable fee or a contingency fee of up to 20%; veterans groups may hire attorneys at any stage of SCDD claims. 38 U.S.C. § 5904(c)(2) & (d)(1); 38 C.F.R. § 14.634(a).

As a new piece of legislation introduced in Conference and distinct from earlier House and Senate bills, the VJRA was accompanied by only one piece of legislative history, the Joint Explanatory Statement. 134 Cong. Rec. H10344-10351 (daily

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[28] *See also Red Lion Broadcasting Co., Inc. v. Federal Communications Comm'n*, 395 U.S. 367, 382 n.11 (1969); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47, *modified on other grounds*, 339 U.S. 908 (1950).

[29] For example, Congress found that existing VA procedures were inadequate because film badges used to measure radiation doses "often provide an incomplete measure of radiation exposure, ... were not issued to most of the participants in nuclear tests, often provided questionable readings, ... and were worn for only limited periods." Pub. L. 98-542 § 2 (9).

ed. Oct. 19, 1988) and 134 Cong. Rec. S16650-16658 (daily ed. Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834-5855. The Joint Explanatory Statement did not refer to any of the purported Congressional findings cited by the Ninth Circuit. To the contrary, it contained many statements criticizing the unfairness of the fee limitation and the reasons for its repeal. *See, e.g.*, 134 Cong. Rec. S16642 (October 18, 1988) (statement of Sen. Cranston).[30] Legislators viewed the fee limitation as particularly pernicious with respect to complex cases such as IR Claims. *Id.* at S16643.

IV. THE NINTH CIRCUIT ERRED BY HOLDING THAT PETITIONERS DID NOT HAVE A FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS BY HIRING ATTORNEYS

Finally, the Ninth Circuit's analysis of petitioners' First Amendment challenge to the fee limitation is also constitutionally defective. Indeed, the Ninth Circuit did not apply a First Amendment test at all, but instead expressly indicated that it would collapse the First Amendment issues into its due process analysis. (App. 22-23.) The tests, however, are distinct. As decisions of this Court have stated repeatedly, any restriction of a First Amendment right must be "narrowly tailored to serve a compelling governmental interest." *See NAACP v. Button*, 371 U.S. 415 (1963); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

By treating the due process and First Amendment challenges as indistinct, the Ninth Circuit essentially held that petitioners lacked any First Amendment interest in petitioning the government for redress. This treatment of petitioners' First

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30 The VJRA also undermined the Ninth Circuit's view that the fee limitation furthers a governmental interest in reducing increased administrative costs. The legislative history of the fee limitation discloses that the original and only rationales for the fee limitation were to preserve the VA benefits undepleted by attorneys' fees and to prevent overreaching by unscrupulous attorneys. These concerns are mooted by Congress's decision to permit veterans' benefit claimants to hire lawyers.

Amendment claims is constitutionally unsound. The right to petition the government is an "undeniable" attribute of national citizenship, *United States v. Cruikshank*, 92 U.S. 542, 552 (1875), "cut from the same cloth as the other guarantees of the [First] Amendment." *McDonald v. Smith*, 472 U.S. 479, 485 (1985). Thus, this Court has recognized in a series of cases that the assistance of an attorney can be an integral part of protected speech and that representation by counsel forms a component of the right to petition the government for redress. *Button*, 371 U.S. 415; *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1976).[31]

The Ninth Circuit purports to distinguish the long line of First Amendment jurisprudence concerning assistance in speaking to and petitioning the government, on the grounds that it concerns the rights of organizations rather than individuals. If there were any doubt before, there is no doubt now that this asserted distinction is not valid. This Court decided two cases after its decision in *Walters* that recognize that the First Amendment protects not only organizations but also individuals who wish to hire assistance in the exercise of their First Amendment rights. *Riley*, 487 U.S. 781; *Meyer v. Grant*, 486 U.S. 414 (1990). Under the *Riley* and *Meyer* decisions, petitioners have a protected First Amendment interest in hiring counsel to speak for them.

In *Riley*, this Court struck down a regulation which limited the amount a charity could pay a professional fundraiser. The

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[31] The government has never disputed that petitioners' IR Claims fall within the scope of the Petition Clause. Moreover, as the District Court noted, petitioners' grievances have political elements as well: these grievances, which implicate issues related to atomic bomb testing, safety of nuclear devices, and governmental responsibility to veterans, have attracted a great deal of public attention and led to the passage of legislation containing significant reforms of the DVA benefits system. (App. 145.) That petitioners' grievances also involve monetary elements has no effect on their protected status. *See United Mine Workers* 389 U.S. at 223; *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980).

Court reasoned that the First Amendment protected the ability to pay for assistance in expression just as it protected the substance of the expression itself, because "a statute regulating how a speaker may speak directly affects that speech." 487 U.S. at 789 n.5. In *Meyer*, this Court invalidated a regulation which prohibited the use of paid circulators to gather signatures on initiative petitions for use in state elections. Again, the Court reasoned that "[t]he First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." 486 U.S. at 424. Much like the professional fundraisers and paid circulators, attorneys help IR Claimants present their points of view more effectively.

Because IR Claimants have a First Amendment protected interest in retaining counsel, the Ninth Circuit should have analyzed the fee limitation under the well-established First Amendment standard. If the Ninth Circuit had applied this standard, it would have found, as did the District Court, that the fee limitation neither served a compelling governmental interest nor was narrowly tailored. (App. 146-47.)

Even assuming that any governmental interest in the fee limitation exists after the VJRA, it is only the interest in ensuring that IR Claimants do not split their benefits award with an attorney. That purported governmental interest is not legitimate, much less compelling, under First Amendment standards, especially since other SCDD claimants can split their fee awards with an attorney under the VJRA. This Court has held unconstitutional a similar "paternalistic premise," when it rejected the notion that "charities' speech must be regulated for their own benefit." *Riley*, 487 U.S. at 790-91. The Court reasoned that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.*

Moreover, the fee limitation is not narrowly tailored. This Court has stated repeatedly that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433. As the District Court recognized, there are numerous narrowly tailored measures that would better serve any

governmental interests in protecting IR Claimants from unscrupulous attorneys, short of denying access to attorneys in all cases. (App. 147.)

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari*.

Dated: September 15, 1993

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No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., Plaintiffs-Appellees,

v.

Edward J. DERWINSKI, Secretary of the Department of Veterans Affairs, et al., Defendants-Appellants.

No. 92-15988.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Sept. 15, 1992.

Decided Nov. 24, 1992.

As Amended on Denial of Rehearing;

Suggestions for Rehearing En Banc

Rejected June 18, 1993.

Lowell V. Sturgill Jr., Dept of Justice, Washington, DC, for defendants/appellants.

Gordon P. Erspamer, Morrison & Foerster, and Matthew I. Larrabee, Heller, Ehrman, White & McAuliffe, San Francisco, CA, for plaintiffs/appellees.

Appeal from the United States District Court for the Northern District of California.

Before: CHOY, ALARCON and HALL, Circuit Judges.

CHOY, Circuit Judge:

A class of individuals with claims for Veterans' Administration ("VA") benefits based on exposure to ionizing radiation during service ("IR claimants/plaintiffs") challenges the constitutionality of a statute that limits to $10 the amount a

claimant can pay an attorney representing him in pursuit of VA benefits. The United States District Court for the Northern District of California held that this fee limitation violates the IR claimants' procedural due process rights as well as their First Amendment right to free speech and to petition the government. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1983, plaintiffs—two veterans' organizations and four individuals—brought an action challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905), which limit the fee a veteran or his survivor may pay an attorney to assist him in prosecuting a claim before the VA to $10. The district court granted a nationwide preliminary injunction prohibiting the enforcement of the fee, *National Ass'n of Radiation Survivors v. Walters*, 589 F.Supp. 1302 (N.D.Cal.1984). The government appealed directly to the Supreme Court, and the Court reversed, holding that the fee limit was not unconstitutional on its face. *Walters* v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S.Ct 3180, 87 L.Ed.2d 220 (1985).[1] The Court left open the possibility of a constitutional attack on the fee limit as applied to particular classes of veterans. *See id.* at 337, 105 S.Ct. at 3198 (O'Connor, J., concurring) ("the Court, in reversing the lower court's preliminary injunction, does not determine the merits of the appellees' individual 'as applied' claims").

On remand, plaintiffs amended their complaint to assert that the fee limit was unconstitutional as applied to individuals with claims based on exposure to ionizing radiation. The district court certified the class of IR claimants. *National Ass'n*

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1 At the time direct appeal to the Supreme Court was proper under 28 U.S.C. § 1252. Congress has since amended the statute to make appeal to this court the appropriate recourse. *See* Pub.L. No. 100-352 § 1, 102 Stat. 662.

of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D.Cal.1986).[2] After extensive pretrial proceedings, the case went to trial.

During and after the trial Congress passed several pieces of legislation relevant to the plaintiffs' claims. Congress passed the Veterans' Judicial Review Act of 1988 ("JRA"), Pub.L. No. 100-687, 102 Stat. 4105 (1988). Prior to the enactment of the JRA a veteran could only appeal a benefits claim up to the Board of Veterans Appeals ("BVA"), an adjudicatory body within the VA. The JRA created the United States Court of Veterans Appeals ("CVA") to review decisions of the BVA. JRA §§ 4051, 4052(a), 102 Stat at 4113. It also provided for judicial review of CVA decisions by the Court of Appeals for the Federal Circuit. *Id.* § 4092, 102 Stat. at 4120. In addition, the JRA amended the fee limitation by providing that a claimant may pay an attorney for services rendered after the BVA makes an initial decision about his claim. *Id.* § 104(a), 102 Stat. at 4108. This scheme allows the claimant to obtain a lawyer for appeals to the CVA and the Federal Circuit, or to conduct further administrative proceedings within the VA by reopening a claim.[3] *Id.* However, the amendment easing the fee limitation only ap-

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2 The class was defined as follows:

> All persons who currently have pending or who file or re-open VA service-connected death and disability compensation I ("SCDD") claims based on exposure to nuclear radiation from government atomic bomb tests in the Marshall Islands or the Nevada Test Site or from the atomic bombs dropped on Hiroshima and Nagasaki in 1945 ("ionizing Radiation Claims"). The class also includes all persons who are receiving or receive SCDD for an Ionizing Radiation Claim but: (1) whose compensation has been reduced or is threatened with reduction, or (2) who have formally contested, or formally contest, the disability rating issued by the VA or the period of retroactive compensation.

National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 597-98 (N.D.Cal. 1986).

3 A claim can be reopened for further proceedings before the VA if there is new material evidence that was not considered in the earlier adjudication of the claim. JRA § 3008, 102 Stat. at 4107.

plies to claimants who have filed a Notice of Disagreement on or after November 18, 1988.[4] *Id.* § 403, 102 Stat. at 4122. The JRA may moot the complaints of some IR claimants but it does not affect those who filed Notices of Disagreement before the effective date of the JRA.

Congress also passed the Radiation-Exposed Veterans Compensation Act of 1988, Pub.L. No. 100-321, 102 Stat. 485 (1988). This act creates a presumption that certain diseases, which manifest to a degree of ten percent within specified latency periods, are service-connected. If the veteran contracts a disease not listed in the statute or it remains latent beyond the specified periods, no presumption exists. This Act, therefore, does not affect the claims of all of the class plaintiffs. Moreover, those that it does affect are still subject to the fee limit.

Finally, Congress passed the Radiation Exposure Compensation Act, Pub.L. No. 101-426, 104 Stat. 920 (1990). This act provides for one-time payments of $50,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and meet certain other criteria. The payment will be decreased by the amount of "any payment made pursuant to a final award of settlement on a claim" based on injuries resulting from exposure to radiation. Pub.L. No. 101-426, § 6(c)(2). The district court found that veterans' benefits may result in an offset of the lump sum payment. *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392, 1394 n. 1 (N.D.Cal.1992).

Because none of these statutes moot the claims of all of the class members, the district court found it necessary to pass on the constitutionality of the scheme as it applied to the remaining plaintiffs. The district court found that the fee limit, as applied to the class of IR claimants, was an unconstitutional de-

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4 When a veteran initially files a claim it goes before a ratings board at a regional VA office. If the ratings board denies the claim, the claimant can appeal that decision by filing a Notice of Disagreement.

privation under the Due Process Clause of the Fifth Amendment and the First Amendment's guarantee of the right to free speech and the right to petition the government for redress of grievances. *Derwinski*, 782 F.Supp. at 1412. The government appeals this ruling.

A main point of contention in this case is the alleged difficulty of pursuing an IR claim for benefits within the VA. In describing the procedure for processing service-connected disability or death ("SCDD") claims, the Supreme Court in *Walters* noted that "[t]he process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311, 105 S.Ct. at 3184. A number of general regulations govern the procedure for examining SCDD claims.

A veteran applies for benefits by submitting a claim form to the local veterans agency. A three-person "ratings board" of the VA regional office reviews the claim application. A claimant is "entitled to a hearing at any time on any issue involved in a claim ..." 38 C.F.R. § 3.103(c) (1991). These proceedings are ex parte. *Id.* § 3.103(a). The ratings board determines the extent of the veteran's disability and whether such disability is service-connected. The board is required to "assist a claimant in developing the facts pertinent to [his] claim," *id.*, and to consider any evidence offered by the claimant. *Id.* § 3.103(d). Moreover, the board is required to resolve all reasonable doubts in favor of the claimant. *Id.* § 3.102.

After reviewing the evidence, the rating board either denies the claim or assigns a disability rating upon which benefits are calculated. The board notifies the claimant of its decision, and the claimant may appeal the board's decision by filing a Notice of Disagreement with the local agency. If the local agency stands by its original decision, it issues a "Statement of the Case" that describes the facts and applicable law upon which its decision is based. The claimant may then appeal to the BVA. Before the amendments discussed above were enacted, the BVA's decisions were not subject to judicial review. *See Walters*, 473 U.S. at 311, 106 S.Ct. at 3184. Under the JRA, however, claimants who file a Notice of Disagreement on or

after November 18, 1988 can appeal BVA decisions to the CVA and then to the Court of Appeals for the Federal Circuit while claimants who filed a Notice of Disagreement before November 18, 1988 do not have that option.

In addition to the general regulations, the VA has adopted regulations specifically dealing with IR claims pursuant to a mandate from Congress in the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (1984). Section 3.311b of Title 38 of the Code of Federal Regulations sets forth three requirements an IR claimant must meet in order to have the VA investigate his claim: (1) the veteran must have been exposed to ionizing radiation due to participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki from September 1945 until July 1946, or other activities as claimed; (2) the veteran must have subsequently developed one of seventeen delineated diseases; and, (3) the veteran must have developed the disease within a specified period of time.

If an IR claimant meets the criteria of § 3.311b, the VA will investigate the claim by gathering factual information and requesting an estimate from the Defense Nuclear Agency ("DNA") of the radiation dose the veteran was exposed to during service.[5] If any of the three requirements are not met the VA determines that the alleged disease did not result from ionizing radiation.

Various national veterans' organizations make available trained service representatives to assist claimants in developing and presenting their claims before the VA. These service representatives provide assistance free of charge, and any claimant who requests a representative will receive assistance.

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5 A claimant may submit a separate radiation dose estimate from a "credible source." If the claimant's estimate is at least double the estimate prepared from the official military record, the matter is referred to an independent expert for the preparation of a separate dose estimate. *Id.* § 3.31 1 b(a)(3).

II. STANDARD OF REVIEW

The district court made a number of factual findings concerning the nature of IR claims. We review these factual findings for clear error. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir.1985). The district court's conclusions regarding the due process and First Amendment claims present mixed questions of law and fact since they involve a determination of whether factual findings satisfy undisputed rules of law. *United States v. McConney*, 728 F.2d 1195, 1200, 1205 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Normally, mixed questions of law and fact are reviewed *de novo* because they require the consideration of legal concepts. *Id.* at 1202. Because this is particularly true in a case involving constitutional rights, *id.* at 1203, we review the district court's conclusions regarding the due process and First Amendment claims *de novo*.[6]

III. DISCUSSION

A. Due Process Claim

Our evaluation of the due process claim is controlled by *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct 893, 47 L.Ed.2d 18

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6 Mixed questions of law and fact can be reviewed under the clearly erroneous standard if the concerns of judicial administration in a particular case favor a district court determination of whether the facts satisfy the legal standard. *Id.* at 1202. Plaintiffs assert that the clearly erroneous standard should be applied to the district court's due process and First Amendment findings due to the size and complexity of the record in this case and the fact-intensive nature of the district court's ruling. Although the size and complexity of the record support applying a deferential standard to the district court's factual findings, precedent establishes that the *de novo* standard of review is appropriate for mixed questions involving constitutional issues. *Id.* at 1203 ("The predominance of factors favoring *de novo* review is even more striking when the mixed question implicates constitutional rights."); *United States v. Spokane*, 918 F.2d 84, 86 (9th Cir. 1990) *cert. denied*, __ U.S. __, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 n. 1 (9th Cir. 1990) (mixed question of fact and law involving First Amendment free speech rights is subject to *de novo* review).

(1976). Under *Mathews*, we must balance the government's interest in enforcing the fee limitation; the private interest affected by the limitation; the risk of an erroneous deprivation of IR benefits under the present VA system; and the probability that allowing veterans to retain counsel would avoid erroneous deprivations of IR benefits. *Id.* at 335, 96 S.Ct. at 903.

The district court applied the *Mathews* test and concluded that the government has no significant interest in retaining the fee limit, that the private interest in IR claims is great, that there is currently a high risk of erroneous deprivation of IR claims, and that the assistance of attorneys would sharply reduce the potential for error.[7] We find that the district court erred in its assessment of each of these factors.

(1) The Government's Interest in the Fee Limit

The Supreme Court in *Walters* described the governments interest in the fee limit as follows: "the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Walters*, 473 U.S. at 321, 105 S.Ct. at 3189. The Supreme Court in *Walters* accorded this government interest "great weight." *Id.* at 326, 105 S.Ct. at 3192.

On remand, the district court found that Congress had rejected this asserted interest when it passed the JRA by allowing veterans to pay attorneys' fees when pursuing claims after

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[7] As a preliminary criterion for finding a procedural due process violation, the district court correctly concluded that both applicants for and recipients of SCDD benefits possess a constitutionally protected property interest in those benefits. *Derwinski*, 782 F.Supp. at 1395; *see Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (recipients of social security benefits have a constitutionally protected property interest); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (applicant for social security benefits has a property interest in those benefits); *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir.1982) (applicants for federal rent subsidies have a constitutionally protected property interest).

the initial BVA decision. *Derwinski*, 782 F.Supp. at 1408-09.[8] The government asserts that, far from rejecting that interest, in passing the JRA Congress reaffirmed the government's interest in the fee limitation because it retained the fee limit for administrative proceedings within the VA system up to the initial decision issued by the BVA.[9] We agree with this contention and find that the district court misinterpreted the significance of the passage of the JRA in relation to the government's interest in the fee limit.

The legislative history of the JRA strongly supports this conclusion. The Committee Report on the Senate version of the bill, which Congress eventually passed after incorporating several portions of the House bill, stated that attorneys were unnecessary during initial administrative proceedings:

> [T]here would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application. Moreover, even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the

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[8] The district court also found that the government's interest was weakened by recently issued VA regulations which provide that an attorney "may receive a fee or salary in excess of the statutory limit from an organization, governmental entity, or other disinterested third party for representation of a claimant." 38 C.F.R. § 14.634(a). The district court stated that it could not "conceive of any rational government interest which would be served by effectively preventing individual claimants from retaining the assistance of counsel for adjudication of their VA claims when non-profit organizations may retain these same attorneys for the same purpose." *Derwinski*, 782 F.Supp. at 1409.

However, as the government points out, its interest in preventing veterans from having to divide their benefits awards with lawyers is unaffected by the recent VA regulations. Allowing a third party to pay an attorney to represent the veteran does not compromise the veteran's benefits award.

[9] Even where the fee limit is inapplicable, the attorney must submit his or her fee agreement to the BVA for review. JRA, § 104(a), 102 Stat. at 4108. The BVA may reduce the fee if it is "excessive or unreasonable." *Id.*

> substantial expenses for attorney representation that may not be involved in appealing the case for the first time to the BVA. The claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA.

S.Rep. No. 418, 100th Cong., 2d Sess. at 63-64 (1988), U.S. Code Cong. & Admin. News p. 5782.

The Committee also reported that the bill was intended to maintain the system of service representatives. "[T]he Committee is concerned that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." *Id.* at 63.[10]

Furthermore, a similar argument to the district court's was considered and rejected by the Supreme Court in *Walters*. In his *Walters* dissent Justice Stevens made an argument similar to the district court's based on a proposed bill that provided for limited judicial review of BVA decisions and eased the attorney fee limit. *Walters*, 473 U.S. at 365-66, 105 S.Ct. at 3212-13 (Stevens, J., dissenting). In rejecting Justice Stevens' reasoning, the Court emphasized the fact that the proposed bill retained the fee limit for administrative proceedings up to the initial BVA decision. *Walters*, 473 U.S. at 322 & n. 10, 105 S.Ct. at 3190 n. 10.

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[10] Plaintiffs assert that when the fee limitation initially was enacted it was intended to prevent unscrupulous attorneys from charging unjustified fees for completing simple forms. The Senate Report for the JRA does explicitly state that concern over unscrupulous attorneys is no longer warranted. *Id.* at 64. Plaintiffs argue that the government should not be allowed to assert a different purpose for the fee limitation than the original purpose. We find this argument without merit. Although when initially enacted the fee limit may have been motivated by a desire to protect claimants from unscrupulous attorneys, the Senate Committee Report for the JRA indicates that Congress now endorses other purposes for maintaining a fee limit through the initial BVA decision and we see no reason why the government is precluded from asserting these other purposes.

We find that the passage of the JRA did not undermine the government's interest in the fee limit. The retention of the fee limit through the initial BVA decision and the legislative history of the JRA indicate that Congress continues to believe that the government has a strong interest in minimizing attorney participation in benefits proceedings before the VA.

The district court also concluded that enabling claimants to retain counsel would not increase the cost of administration of IR claims. This contradicts the Supreme Court's finding in *Walters* that the introduction of lawyers into administrative proceedings is likely to have serious adverse consequences:

> A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. ... The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. ...
>
> ...
>
> ... It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. ... And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

Id. at 323-24, 326, 105 S.Ct. at 3190-91, 3192; *see also Wolff v. McDonnell*, 418 U.S. 539, 570, 94 S.Ct. 2963, 2981, 41 L.Ed.2d 935 (1974) (use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast"); *Gagnon v. Scarpelli*, 411 U.S. 778, 787, 93 S.Ct. 1756, 1762, 36 L.Ed.2d 656 (1973) ("introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding").

The district court's dismissal of the potentially detrimental effects of increasing the number of lawyers appearing before the VA severely discounts the Supreme Court's finding in *Walters*. On the basis of the legislative history of the JRA and the Supreme Court's statements in *Walters*, we find the district court's conclusion that the government has no significant interest in retaining the fee limit flawed. The passage of the JRA serves to reaffirm the government's strong interest in retaining the fee limit. The Supreme Court's assessment of the government's interest in the fee limit in *Walters* remains valid.

(2) Private Interest

The district court found that a "substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support." *Derwinski*, 782 F.Supp. at 1396. This factual finding supported the district court's conclusion that the private interest at stake in IR claims is "great." *Id.* at 1407.

The government argues that since IR benefits are not need-based the district court should not have concluded that the private interest in IR claims is strong. This argument is supported by the holding in *Walters*, in which the Supreme Court found the fact that VA benefits are not need-based "determinative of the right to employ counsel." 473 U.S. at 333, 105 S.Ct. at 3195.[11] While the government concedes in its Reply Brief that non-need based benefits can be subject to due process, it takes the position that the district court's findings regarding the poverty of IR claimants and their dependence on VA benefits are irrelevant in assessing whether the process used to determine IR claims comports with the Constitution. While the poverty of the IR claimants is not necessarily irrelevant in assessing their private interest, we agree with the government that non-need based benefits do not create as strong

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[11] In reaching this conclusion the Supreme Court distinguished VA benefits from welfare benefits. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)).

an interest as need-based benefits. *Mathews*, 424 U.S. at 342-43, 96 S.Ct. at 906.

The government also argues that the class of IR claimants in this case consists of applicants for benefits rather than recipients, and that this fact weakens their interest in challenging the fee limit. The veterans respond that their plaintiff class contains both applicants and recipients and therefore the government's argument must fail. The definition of the certified class does include recipients. *See supra* note 2. However, the government states that because the VA concedes that the JRA would apply to current recipients of benefits, all recipients are removed from the class, leaving only applicants.[12] Ultimately, whether the class now includes any recipients remains unclear. To the extent that the class includes applicants, we do agree with the government's contention that applicants have weaker interests in government benefits than recipients. *See Ressler v. Pierce*, 692 F.2d 1212, 1217 (9th Cir.1982) (applicants for HUD rent subsidiaries are entitled to due process protection in application and selection process).

Even though the remaining class might include some recipients, the fact that IR benefits are not need-based compels us to find that the district court erred in characterizing the private interest of IR claimants as "great". Accordingly, we reduce the weight accorded the IR claimants' private interest in evaluating the due process claim.

(3) Risk of Erroneous Deprivation of Benefits

The final factors under *Mathews* are the "risk of an erroneous deprivation of [the claimant's] interest" and the

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12 In its Reply Brief the government states that the VA concedes that the JRA would apply to any attempt to reduce recipients' IR benefits. It is not entirely clear whether this would truly remove all recipients from the class. That concession does not appear to exempt recipients falling into the second part of the class definition, those contesting the disability rating or period of retroactive compensation. The VA is not attempting to reduce the benefits of those recipients, rather the recipients are attempting to increase their benefits by challenging VA decisions.

"probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903; *see Walters*, 473 U.S. at 321, 105 S.Ct. at 3189. The Supreme Court in *Walters* explained that due process law accords legislatures considerable flexibility in devising processes for dispute resolution. *Id.* at 326, 105 S.Ct. at 3192. Therefore, the Court held, "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." *Id.*

On the bases of a number of factual findings, the district court concluded that the VA's system for handling IR claims created a substantial risk that claimants erroneously will be deprived of benefits. *Derwinski*, 782 F.Supp. at 1396-1402. It also found that the VA's procedural safeguards are inadequate to decrease the risk of error and that lawyers are necessary to minimize the errors. *Id.* at 1402-07. Considering all the evidence, the district court concluded that plaintiffs "made an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility." *Id.* at 1409.

The government argues that the district court made several errors in reaching these conclusions. First, the government argues that the district court improperly substituted its judgment for the informed decisions of Congress. *See Mathews*, 424 U.S. at 349, 96 S.Ct. at 909 ("substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals"); *Walters*, 473 U.S. at 334, 105 S.Ct. at 3196. The government argues that the district court's holding requires the VA to adopt an adversarial mode of decision-making rather than the informal system now in place. We find that, with regard to certain of the district court's factual findings discussed more fully below, insufficient deference was given to Congressional findings.

Additionally, the government argues that the district court erred in assessing the type of evidence necessary to determine that the IR claims process fails to meet due process requirements. The government asserts that the district court wrongly focused on whether the VA process is too complex and that the district court should have looked at two other factors. First, the government urges that the proper inquiry is whether lawyers are necessary to make the process fair, not whether lawyers are better able to pursue claims than non-lawyers. *See Walters*, 473 U.S. at 331, 105 S.Ct. at 3194. Second, the court should have focused on whether the IR claims process has produced or is substantially likely to produce a significant number of wrongful denials of claims as opposed to focusing on the complexity of the process. *Id.* at 330, 105 S.Ct. at 3194 ("a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"). The government correctly articulated the standards set forth in *Walters*. We find that the district court failed to adhere to those standards.[13]

(a) Findings Regarding the Complexity of IR Claims

The district court found that several level of complexity in the VA system for handling IR claims made it suspect under the Due Process Clause. The court divided its analysis into three parts: (1) the complexity in the governing law and procedure; (2) the complexity of the medical and scientific issues raised by IR claims; and, (3) the development of complex factual issues supporting IR claims.

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[13] The government also contends that the district court erred by failing to consider the VA's evidence that its informal process of handling IR claims comports with due process. This argument lacks merit. The fact that the district court did not discuss portions of the evidence presented neither indicates that the district court ignored that evidence, nor provides a basis for disregarding the district court's factual findings. *Truck Terminals, Inc. v. Commissioner*, 314 F.2d 449, 454-55 (9th Cir.1963). The district court was presented with a large amount of conflicting evidence and we will not reverse its resolution of those conflicts unless it is clearly erroneous. *Mayview Corp. v. Rodstein*, 620 F.2d 1347, 1353 (9th Cir. 1980).

The district court found that the complexity of the governing law and procedure makes it difficult for a layperson to file and process an IR claim. The government argues that claimants do not need to be able to use these materials to file a claim because the VA does the work for them; the system is designed so that veterans can file and process claims without the help of an attorney.

Our review of the legislative history of the JRA confirms that the system comports with the government's view of the VA claims process:

> [The existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure, with the VA generally securing the relevant military records as well as evaluating the merits of the claim. ... there would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application.

S.Rep. No. 418, 100th Cong., 2d Sess. at 63 (1988); *see also* H.Rep. No. 963, 100th Cong., 2d Sess. at 13-14, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. Congress is a body particularly well suited to engage in factual analysis of issues involving large quantities of information and its determination regarding the manner in which the VA benefits system operates is entitled to great deference. *Walters*, 473 U.S. at 331 n. 12, 105 S.Ct. at 3194 n. 12.

Notably, the district court did not conclude that significant numbers of IR claimants have been denied benefits because they were unable to follow the procedures necessary to pursue their claims. Rather, its finding that the governing law and procedure involved in the IR claims process is complex is based solely on a description of the process for assessing those claims in the abstract. In *Walters*, the Supreme Court specifically rejected the district court's finding at the preliminary injunction stage that the SCDD benefits process was complex because that finding was based on a discussion of that process in the abstract. *Walters*, 473 U.S. at 329, 105 S.Ct. at 3193. The

Supreme Court's reasoning in *Walters* indicates that the district court's finding regarding the complexity of the law and procedures of IR claims is not sufficient to establish a due process violation.

The district court also found that IR claims present much more complex medical and scientific issues than other SCDD claims. *Derwinski*, 782 F.Supp. at 1398-1402. Based on these findings the district court determined that to properly present an IR claim expert medical opinion and testimony as well as scientific evidence must be marshalled. *Id.* at 1402.

The government asserts that, although the district court found that IR claims are complex, it did not find that a significant number of IR claimants wrongfully were denied benefits due to the medical and scientific complexities of IR claims. The government suggests that such a finding is necessary to determine that the VA system is not working because without this evidence IR cases are not materially different from all SCDD claims controlled by *Walters*.[14]

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[14] In response to the district court's findings on the complexity of determining disease causation and of accurately assessing radiation dose estimates the government further contends that the district court failed to give adequate deference to Congress' determination that these issues should not be resolved on a case-by-case basis.

The government's argument is unpersuasive. The Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, Pub.L. No. 98-542, 98 Stat. 2725 (1984), conferred considerable discretion on the VA in establishing the proper guidelines for assessing IR claims. The VA regulations adopted pursuant to Pub.L. No. 98-542 provide for individualized assessments of IR claims. See 38 C.F.R. § 3.31 lb(c)-(e). The government's contention that the current benefits system eliminates case-by-case determinations of causation is incorrect.

Similarly, the current benefits system already allows for individualized consideration of radiation dose estimates. Both Pub.L. No. 98-542 and the regulation adopted pursuant to that law, 38 C.F.R. § 3.311b, allow IR claimants to submit their own radiation dose estimates. Pub.L. No. 98-542, § 7(b), 98 Stat. at 2731; 38 C.F.R. § 3.311b(a)(3).

We agree with the government's analysis. The district court's factual findings indicate that IR claims present considerable medical and scientific complexities; such complexities present the risk of errors in the assessment of IR claims and that risk may be reduced by marshalling medical and scientific evidence. However, on the basis of the district court opinion we cannot assess how frequently such errors actually occur in the present VA system. *Walters*, 473 U.S. at 327, 105 S.Ct. at 3192 (discussing the inability to determine based on the record the quantity of erroneous deprivations of VA benefits).

The district court's findings regarding the complexity of factual development in IR cases present the same problem as the district court's other findings regarding the complexity of IR claims.[15] It ultimately is unclear from its opinion how frequently IR claims wrongly are denied due to inadequate factual development.

We find that the district court's abstract discussion of the complexities involved in IR claims does not provide a sufficient basis for determining that the probability of error under the present system for adjudicating IR claims is truly "extraordinarily strong."

(b) Findings Regarding Procedural Safeguards

The district court also found that procedural safeguards within the VA system, designed to protect the rights of SCDD and IR claimants, do not achieve that goal. *Derwinski*, 782 F.Supp. at 1403-05. It concluded that the VA system actually functions in an adversarial manner and that service representatives are overworked and unable to adequately represent IR

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15 The district court found that properly developing the underlying facts in IR claims is a very intricate process and that much of the relevant information is difficult to obtain. *Derwinski*, 782 F.Supp. at 1402.

claimants. *Id.* at 14030-06.[16] Once again, the district court ignored Congressional findings establishing the opposite contention. Recent Congressional reports state that the VA benefits system does function in a nonadversarial manner and that the service representatives effectively represent VA claimants.

The House Report prepared in conjunction with the JRA notes that "[o]ne of the most valuable features of the present VA system is the participation of unpaid veteran service organization representatives in every aspect of the VA benefits system." H.Rep. No. 963, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5807; *see also* S.Rep. No. 418, 100th Cong., 2d Sess. at 64 (1988) ("[There is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants."); *Walters*, 473 U.S. at 322, 105 S.Ct. at 3190. In addition, the House Report indicates that the VA system functions in a non-adversarial manner. H.Rep. No. 963, reprinted in 1988 U.S.C.C.A.N. 5782, 5811 ("the VA is expressly encourage[d] to preserve its informal, non-adversarial procedures").

These Congressional findings are deserving of our great deference. "When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters*, 473 U.S. at 331 n. 12, 105 S.Ct. at 3194 n. 12; *see also Rostker v. Goldberg*, 453 U.S. 57, 72-73, 101 S.Ct. 2646, 2656, 69 L.Ed.2d 478 (1981). The district court was not free to ignore these Congressional findings on the adequacy of VA procedures when evaluating the due process claim.

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[16] The district court also found that the VA has erroneously applied 38 C.F.R. § 3.309 dealing with presumptive service connection, resulting in wrongful denial of claims. *Id.* at 1403. Unfortunately, the district court did not quantify the frequency of such errors, making it difficult to assess how much weight such errors should be given in the due process analysis. *See Walters*, 473 U.S. at 320, 105 S.Ct. at 3189 ("the [Due Process] Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error.'" (quoting *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979)).

(4) Probable Value of Attorneys in Reducing The Risk of Error

The Supreme Court in *Walters* stated that "it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment." *Walters*, 473 U.S. at 330, 105 S.Ct. at 3194.[17] The district court found that IR claims present many tasks for which attorneys particularly are well suited. Attorneys could secure government documents with relevant information, help claimants avoid procedural errors, enhance the effective use of medical and scientific experts, conduct detailed factual development, and prepare briefs. *Derwinski*, 782 F.Supp. at 1406. The government concedes that attorneys could assist with a number of tasks but asserts that this does not indicate that lawyers are *necessary* to ensure procedural fairness in the adjudication of IR claims. *See Walters*, 473 U.S. at 331, 105 S.Ct. at 3194.

In support of its finding, the district court stated that "evidence demonstrates that IR claimants who employ attorneys have had significantly higher success rates than those relying on service representatives." *Derwinski*, 782 F.Supp. at 1407. The evidence referenced in that quote showed that in IR claims handled by lawyers the claims were granted in 5 out of 31 cases (16%) while in IR claims not handled by lawyers the claims were granted in 35 out of 5,456 cases (.6%).

This is a greater disparity than the 2% difference between general SCDD claims adjudicated with and without attorneys which the Supreme Court found inadequate to show a due process violation in *Walters*. However, the difficulty with according great weight to the results reached in 5 cases is the absence of evidence on the relative strength of the claims in those cases as compared to other IR claims.

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17 *See also Washington v. Harper*, 494 U.S. 210, 236, 110 S.Ct. 1028, 1044, 108 L.Ed.2d 178 (1990) (quoting *Walters*, 473 U.S. at 330, 105, S.Ct. at 3194) (holding that due process does not require the presence of counsel in civil proceedings to authorize medical treatment of mentally ill prisoners).

Given our findings as to the governmental and private interests at stake in this case, and given that the issue is whether the presence of attorneys would "sharply diminish" the probability of error in the adjudication of IR claims, we conclude that the evidence presented does not satisfy the extraordinarily strong showing standard set forth in *Walters*, and we find no due process violation.

B. First Amendment Claim

The district court also held that the fee limitation violates the IR claimants' First Amendment right to free speech and to petition the government. *Derwinski*, 782 F.Supp. at 1412. The claim that the fee limit raises First Amendment issues is based on a series of Supreme Court opinions holding that collective activity taken to achieve meaningful access to the courts is protected by the First Amendment. *See United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971).

In *Walters* the Supreme Court noted that there were "numerous conceptual difficulties" with extending those cases to the situation involving VA claimants. *Walters*, 473 U.S. at 334, 105 S.Ct. at 3196. Since the above cases all involved organizations helping their members secure legal representation, the Court found "the First Amendment interest at stake [in those cases] was primarily the right to associate collectively for the common good." *Id.* at 335, 105 S.Ct at 3196. In contrast, the Court found the First Amendment interest in this case to be an individual interest in best pursuing a claim. *Id.*

Despite the fact that those First Amendment cases dealt with collective activity, both the district court and plaintiffs assert that they are applicable to the situation involving IR claimants and cite a number of decisions that have interpreted those Supreme Court cases as applying to individuals as well as to organizations. *See, e.g., Rizzo v. Dawson*, 778 F.2d 527, 531

(9th. Cir.1985) (plaintiff's claim that prison transfer was retaliation for his work assisting other prisoners as a "jailhouse lawyer" and for pursuing his own legal action was sufficient to state a First Amendment claim); *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich.1988) (prison's library and the legal assistance available to prisoners were inadequate to provide prisoners meaningful access to courts), *aff'd without opinion*, 871 F.2d 1087 (6th Cir.1989); *Jackson v. Procunier*, 789 F.2d 307 (5th Cir.1986) (prison mailroom delays in delivering prisoner's legal papers may have interfered with his right of access to the courts).

It is unclear that such cases, which are factually distinct, would apply to a situation involving IR claimants who assert "a First Amendment right to pay their surrogate speaker" before an administrative agency. *Walters*, 473 U.S. at 335, 105 S.Ct. at 3196. The Supreme Court in *Walters* found the notion that VA claimants have a First Amendment right to pay a surrogate speaker a "questionable proposition." *Id.*

Although the First Amendment extends to the right to petition an administrative agency,[18] what constitutes "meaningful access" to an agency may not be the same as what constitutes "meaningful access" to a court. A number of opinions express the view that legal aid often is necessary to achieve meaningful access to the courts. *See, e.g., Maitin v. Lauer*, 686 F.2d 24, 32 (D.C.Cir.1982); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1108 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). Whether the aid of an attorney is necessary for IR claimants to achieve "meaningful access" to the VA benefits process is the main point of contention in this case. Since the heart of the First Amendment inquiry is whether the IR claimants currently have "meaningful access" to the VA benefits process, we conclude that the focus of the First Amendment analysis is essentially the same as that under the Due Process Clause. *Walters*, 473 U.S. at 335, 105

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18 *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972).

S.Ct. at 3196 ("appellees' First Amendment arguments, at base, are really inseparable from their due process claims").

We have already determined in our due process analysis that attorneys are not necessary to afford IR claimants meaningful access to the VA benefits process. We likewise determine that the fee limit does not violate appellees' First Amendment rights.

REVERSED.

WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. V. NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. 84-571. ARGUED MARCH 27, 1985-DECIDED JUNE 28, 1985

Mark I. Levy argued the cause for appellants. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *William Kanter.*

Gordon P. Erspamer argued the cause and filed a brief for appellees National Association of Radiation Survivors et al. *Robert L. Gnaizda* filed a brief for appellee American G.I. Forum.* *

JUSTICE REHNQUIST delivered the opinion of the Court.

Title 38 U.S.C. § 3404(c) limits to $10 the fee that may be paid an attorney or agent who represents a veteran seeking benefits for service-connected death or disability. The United

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* *Joseph C. Zengerle* filed a brief for Disabled American Veterans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Burt Neuborne, Charles S. Sims, Alan L. Schlosser,* and *Amitai Schwartz;* for the American Veterans Committee, Inc., by *Michael W. Beasley, Allan L. Kamerow, Lawrence E. Lewy,* and *Irving R.M. Panzer;* for the Federal Bar Association by *Alfred F. Belcuore;* for the Lawyers' Club of San Francisco by *Jerome Sapiro Jr.,* and *Fred H. Altshuler;* for the National Association of Atomic Veterans by *Walter R. Allan, Karen J. Wegner,* and *Debra B. Keil;* for Vietnam Veterans of America by *Mary E. Baluss, Samuel M. Sipe, Jr., David F. Addlestone,* and *Barton F. Stichman;* and for Andrew Groza by *James Joseph Lynch, Jr.*

States District Court for the Northern District of California held that this limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment, because it denies veterans or their survivors the opportunity to retain counsel of their choice in pursuing their claims. We noted probable jurisdiction of the Government's appeal, 469 U.S. 1085 (1984), and we now reverse.

I

Congress has by statute established an administrative system for granting service-connected death or disability benefits to veterans. See 38 U.S.C. § 301 *et seq*. The amount of the benefit award is not based upon need, but upon service connection—that is, whether the disability is causally related to an injury sustained in the service—and the degree of incapacity caused by the disability. A detailed system has been established by statute and Veterans' Administration (VA) regulation for determining a veteran's entitlement, with final authority resting with an administrative body known as the Board of Veterans' Appeals (BVA). Judicial review of VA decisions is precluded by statute. 38 U.S.C. § 211(a); *Johnson v. Robison*, 415 U.S. 361 (1974). The controversy in this case centers on the opportunity for a benefit applicant or recipient to obtain legal counsel to aid in the presentation of his claim to the VA. Section 3404(c) of Title 38 provides:

> "The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> . . . .
>
> "(2) shall not exceed $10 with respect to any one claim. . . . "

Section 3405 provides criminal penalties for any person who charges fees in excess of the limitation of § 3404.

Appellees here are two veterans' organizations, three individual veterans, and a veteran's widow.[1] The two veterans' organizations are the National Association of Radiation Survivors, an organization principally concerned with obtaining compensation for its members for injuries resulting from atomic bomb tests, and Swords to Plowshares Veterans Rights Organization, an organization particularly devoted to the concerns of Vietnam veterans. The complaint contains no further allegation with respect to the numbers of members in either organization who are veteran claimants. Appellees did not seek class certification.

Appellees contended in the District Court that the fee litigation provision of § 3404 denied them any realistic opportunity to obtain legal representation in presenting their claims to the VA and hence violated their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment. The District Court agreed with the appellees on both of these grounds, and entered a nationwide "preliminary injunction" barring appellants from enforcing the fee limitation. 589 F. Supp. 1302 (1984). To understand fully the posture in which the case reaches us it is necessary to discuss the administrative scheme in some detail.

Congress began providing veterans pensions in early 1789, and after every conflict in which the Nation has been involved Congress has, in the words of Abraham Lincoln, "provided for him who has borne the battle, and his widow and his orphan." The VA was created by Congress in 1930, and since that time has been responsible for administering the congressional program for veterans' benefits. In 1978, the year covered by the report of the Legal Services Corporation to Congress that was introduced into evidence in the District Court, approximately 800,000 claims for service-connected disability or death and pensions were decided by the 58 regional offices of the VA. Slightly more than half of these were claims for service-connected disability or death, and the remainder were pension

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1 A fourth individual veteran plaintiff died during the pendency of the proceedings.

claims. Of the 800,000 total claims in 1978, more than 400,000 were allowed, and some 379,000 were denied. Sixty-six thousand of these denials were contested at the regional level; about a quarter of these contests were dropped, 15% prevailed on reconsideration at the local level, and the remaining 36,000 were appealed to the BVA. At that level some 4,500, or 12%, prevailed, and another 13% won a remand for further proceedings. Although these figures are from 1978, the statistics in evidence indicate that the figures remain fairly constant from year to year.

As might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country. It is commenced by the submission of a claim form to the local veterans agency, which form is provided by the VA either upon request or upon receipt of notice of the death of a veteran. Upon application a claim generally is first reviewed by a three-person "rating board" of the VA regional office—consisting of a medical specialist, a legal specialist, and an "occupational specialist." A claimant is "entitled to a hearing at any time on any issue involved in a claim ..." 38 CFR § 3.103(c) (1984). Proceedings in front of the rating board "are ex parte in nature," § 3.103(a); no Government official appears in opposition. The principal issues are the extent of the claimant's disability and whether it is service connected. The board is required by regulation "to assist a claimant in developing the facts pertinent to his claim," § 3.103(a), and to consider any evidence offered by the claimant. See § 3.103(b). In deciding the claim the board generally will request the applicant's Armed Service and medical records, and will order a medical examination by a VA hospital. Moreover, the board is

directed by regulation to resolve all reasonable doubts in favor of the claimant. § 3.102.1[2]

After reviewing the evidence the board renders a decision either denying the claim or assigning a disability "rating" pursuant to detailed regulations developed for assessing various disabilities. Money benefits are calculated based on the rating. The claimant is notified of the board's decision and its reasons, and the claimant may then initiate an appeal by filing a "notice of disagreement" with the local agency. If the local agency adheres to its original decision it must then provide the claimant with a "statement of the case"—a written description of the facts and applicable law upon which the board based its determination—so that the claimant may adequately present his appeal to the BVA. Hearings in front of the BVA are subject to the same rules as local agency hearings—they are *ex parte*, there is no formal questioning or cross-examination, and no formal rules of evidence apply. 38 CFR § 19.157 (1984). The

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2 Title 38 CFR § 3.102 (1984) states:

"It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every ease. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants involving this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships."

BVA's decision is not subject to judicial review. 38 U.S.C. § 211(a).[3]

The process is designed to function throughout with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts not previously forwarded. See 38 CFR §§ 3.104, 3.105 (1984). Although there are time limits for submitting a notice of disagreement and although a claimant may prejudice his opportunity to challenge factual or legal decisions by failing to challenge them in that notice, the time limit is quite liberal—up to one year—and the VA boards are instructed to read any submission in the light most favorable to the claimant. See 38 CFR §§ 19.129, 19.124, 19.121 (1984). Perhaps more importantly for present purposes, however, various veterans' organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims. These service representatives are contemplated by the VA statute, 38 U.S.C. § 3402, and they are recognized as an important part of the administrative scheme. Appellees' counsel agreed at argument that a representative is available for any claimant who requests one, regardless of the claimant's affiliation with any particular veterans' group.[4]

In support of their claim that the present statutory and administrative scheme violates the Constitution, appellees submitted affidavits and declarations of 16 rejected claimants or recipients and 24 practicing attorneys, depositions of several VA employees, and various exhibits. The District Court

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[3] Despite the general preclusion of judicial review with respect to VA benefits claims, this Court held in *Johnson v. Robison*, 415 U.S. 361 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems.

[4] The VA statistics show that 86% of all claimants are represented by service representatives, 12% proceed *pro se*, and 2% are represented by lawyers. App. 190. Counsel agreed at argument that the 12% who proceed *pro se* do so by their own choice.

held a hearing and then issued a 52-page opinion and order granting the requested "preliminary injunction."[5]

With respect to the merits of appellees' due process claim, the District Court first determined that recipients of service connected death and disability benefits possess "property" interests protected by the Due Process Clause, see *Mathews v. Eldridge*, 424 U.S. 319 (1976) (recipients of Social Security benefits possess a protected "property" interest), and also held that *applicants* for such benefits possess such an interest. Although noting that this Court has never ruled on the latter question, the court relied on several opinions of the Court of Appeals for the Ninth Circuit holding, with respect to similar Government benefits, that applicants possess such an interest. See, *e.g.*, *Ressler v. Pierce*, 692 F. 2d 1212, 1214-1216 (1982) (applicants for federal rent subsidies).

The court then held that appellees had a strong likelihood of showing that the administrative scheme violated the due process rights of those entitled to benefits. In holding that the process described above was "fundamentally unfair," the court relied on the analysis developed by this Court in *Mathews v. Eldridge, supra*, in which we stated the factors that must be weighed in determining what process is due an individual subject to a deprivation:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the ad-

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[5] The District Court rejected appellants' argument that the question presented was controlled by this Court's summary affirmance in *Gendron v. Saxbe*, 389 F. Supp. 1303 (DC Cal.), summarily aff'd *sub nom. Gendron v. Levi*, 423 U.S. 802 (1975). Because we noted probable jurisdiction and heard oral argument in order to decide this case on the merits there is no need for us to determine whether the District Court properly distinguished *Gendron*.

ditional or substitute procedural requirement would entail." 424 U.S., at 335.

In applying this test the District Court relied heavily on appellees' evidence; it noted that the veterans' interest in receiving benefits was significant in that many recipients are disabled, and totally or primarily dependent on benefits for their support. 589 F. Supp., at 1315. With respect to the likelihood of error under the present system, and the value of the additional safeguard of legal representation, it first noted that some of the appellees had been represented by service agents and had been dissatisfied with their representation, and had sought and failed to obtain legal counsel due solely to the fee limitation. The court found that absent expert legal counsel claimants ran a significant risk of forfeiting their rights, because of the highly complex issues involved in some cases. VA processes, the court reasoned, allow claimants to waive points of disagreement on appeal, or to waive appeal altogether by failing to file the notice of disagreement; in addition, claimants simply are not equipped to engage in the factual or legal development necessary in some cases, or to spot errors made by the administrative boards. *Id.*, at 1319-1321.

With respect to whether the present process alleviated these problems, the court found that "neither the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants." *Id.*, at 1320. Even assuming that all VA personnel were willing to go out of their way for each claimant, a point which the court would not fully accept,[6] the court found that in any event the VA does not have the resources to permit the substantial investments of time that are necessary. The VA

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6 The District Court in its opinion questioned "the extent to which it is possible to serve the interests of both the VA and claimants simultaneously," and suggested that there was a "conflict" and that "the VA personnel might feel some pressure to protect the government purse." 589 F. Supp., at 1320, n. 17. There is no indication of such bias in the record, quite the contrary. Nor are we willing to accept that administrative adjudicators are presumptively subject to such bias.

does not seek independent testimony that might establish service connection, or independent medical examinations with respect to disability.

In reaching its conclusions the court relied heavily on the problems presented by what it described as "complex cases"—a class of cases also focused on in the depositions. Though never expressly defined by the District Court, these cases apparently include those in which a disability is slow developing and therefore difficult to find service connected, such as the claims associated with exposure to radiation or harmful chemicals, as well as other cases identified by the deponents as involving difficult matters of medical judgment. Nowhere in the opinion of the District Court is there any estimate of what percentage of the annual VA caseload of 800,000 these cases comprise, nor is there any more precise description of the class. There is no question but what the 3 named plaintiffs and the plaintiff veteran's widow asserted such claims, and in addition there are declarations in the record from 12 other claimants who were asserting such claims. The evidence contained in the record, however, suggests that the sum total of such claims is extremely small; in 1982, for example, roughly 2% of the BVA caseload consisted of "agent orange" or "radiation" claims, and what evidence there is suggests that the percentage of such claims in the regional offices was even less perhaps as little as 3 in 1,000.

With respect to the service representatives, the court again found the representation unsatisfactory. Although admitting that this was not due to any "lack of dedication," the court found that a heavy caseload and the lack of legal training combined to prevent service representatives from adequately researching a claim. Facts are not developed, and "it is standard practice for service organization representatives to submit merely a one to two page handwritten brief." *Id.*, at 1322.

Based on the inability of the VA and service organizations to provide the full range of services that a retained attorney might, the court concluded that appellees had demonstrated a "high risk of erroneous deprivation" from the process as administered. *Ibid.* The court then found that the Government

had "failed to demonstrate that it would suffer any harm if the statutory fee limitation ... were lifted." *Id.*, at 1323. The only Government interest suggested was the "paternalistic" assertion that the fee limitation is necessary to ensure that claimants do not turn substantial portions of their benefits over to unscrupulous lawyers. The court suggested that there were "less drastic means" to confront this problem.

Finally, the court agreed with appellees that there was a substantial likelihood that the fee limitation also violates the First Amendment. The court relied on this Court's decisions in *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), as establishing "the principle that the First Amendment rights to petition, association and speech protect efforts by organizations and individuals to obtain effective legal representation of their constituents or themselves." 589 F. Supp., at 1324. This right to "adequate legal representation" or "meaningful access to courts," the court found, was infringed by the fee limitation—again without substantial justification by the Government. *Id.*, at 1325-1326.

After reiterating the Government's failure of proof with respect to the likely harms arising from doing away with the fee limitation, the court entered a "preliminary injunction" enjoining the Government appellants from "enforcing or attempting to enforce in any way the provisions of 38 U.S.C. §§ 3404-3405 ..." *Id.*, at 1329. The injunction was not limited to the particular plaintiffs, nor was it limited to claims processed in the District of Northern California, where the court sits.

II

Before proceeding to the merits we must deal with a significant question as to our jurisdiction, one not raised by appellees in this Court. This appeal was taken under 28 U.S.C. § 1252, which grants this Court jurisdiction "from an interlocutory or final judgment, decree or order of any court of the United States ... holding an Act of Congress unconstitutional in any civil action ... to which the United States or any of its agencies, or any officer or employee thereof, as such officer or

employee, is a party." We have here an interlocutory decree in a civil action to which an officer of the United States is a party, and the only question is whether the District Court's decision "holds" an Act of Congress unconstitutional. The problem, of course, is that given that the court's opinion and order are cast in terms of a "preliminary injunction" the court only states that there is a "high likelihood of success" on the merits of appellees' claims, and does not specifically state that the fee limitation provision is unconstitutional.

We do not write on a clean slate. In *McLucas v. DeChamplain*, 421 U.S. 21 (1975), this Court similarly entertained an appeal from an order that granted a preliminary injunction and in the process held an Act of Congress unconstitutional. In holding that we had jurisdiction under § 1252 we noted that that section constitutes an "exception" to "the policy ... of minimizing the mandatory docket of this Court," and we went on to state:

> "It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally 'hold' the article unconstitutional. By its terms, however, § 1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief." *Id.*, at 30.

We think this case is controlled by *McLucas*. It is true that in *McLucas* the District Court actually stated its holding that the statute was unconstitutional, whereas here the court's statements are less direct. But that is merely a semantic difference in this case; inasmuch as any conclusions reached at the preliminary injunction stage are subject to revision, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), it should make little difference whether the court stated conclusively that a statute was unconstitutional, or merely said it was likely, so

long as the injunction granted enjoined the statute's operation. This Court's appellate jurisdiction does not turn on such semantic niceties. See also *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982) ("§ 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional ...").

Indeed, we note that the problem raised by the statute's use of the word "holding" may in any event be a bit of a red herring. In its original form § 1252 provided this Court with appellate jurisdiction over decisions "against the constitutionality of any Act of Congress," see Act of Aug. 24, 1937, ch. 754, § 2,50 Stat. 752;[7] although this language was changed when the provision was codified in 1948, so that § 1252 now grants jurisdiction from a decision "*holding* any Act of Congress unconstitutional," this change was effected without substantive comment, and absent such comment it is generally held that a change during codification is not intended to alter the statute's scope. See *Muniz v. Hoffman*, 422 U.S. 454, 467-474 (1975). Any fair reading of the decision at issue would conclude that it is "against the constitutionality" of § 3404, and we are loath to read an unheralded change in phraseology to divest us of jurisdiction here.

Finally, acceptance of appellate jurisdiction in this case is in accord with the purpose of the statutory grant. Last Term, in *Heckler v. Edwards*, 465 U.S. 870 (1984), we discussed § 1252's legislative history. We noted that in enacting § 1252 Congress sought to identify a category of important decisions adverse to the constitutionality of an Act of Congress—which decisions, because the United States or its agent was a party, had impli-

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7 Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 752, provided:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party. ..."

cations beyond the controversy then before the court—and to provide an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act by establishing direct review over such decisions in this Court. *Id.*, at 879-883. Edwards teaches that the decisions Congress targeted for appeal under § 1252 were those which involved the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, and that it was the constitutional question that Congress wished this Court to decide. As we pointed out in *McLucas*, § 1252 contemplates that this impairment can arise from interlocutory decrees, just as the original statute provided for appeal from decisions in "any proceedings." Cf. *Goldstein v. Cox*, 396 U.S. 471, 476 (1970) (28 U.S.C. § 1253 authorizes direct appeals from preliminary injunctions issued by three-judge courts). A single district judge's interlocutory decision on constitutional grounds that an Act of Congress should not be enforced frustrates the will of Congress in the short run just as surely as a final decision to that effect. By § 1252 Congress gave the Government the right of immediate appeal to this Court in such a situation so that only those district court injunctions which had been reviewed and upheld by this Court would continue to have such an effect. Cf. *Edwards, supra.* The injunction at issue here creates precisely the problem to which § 1252 was addressed, inasmuch as it enjoins the operation of the fee limitation on constitutional grounds, across the country and under all circumstances. Thus, whether or not the injunction here is framed as a "holding" of unconstitutionality we believe we have jurisdiction under § 1252.

III

Judging the constitutionality of an Act of Congress is properly considered "'the gravest and most delicate duty that this Court is called upon to perform,"' *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government. Indeed one might

think, if anything, that more deference is called for here; the statute in question for all relevant purposes has been on the books for over 120 years. Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 401-402 (1819). This deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Mathews v. Eldridge*, 424 U.S., at 349. We think that the District Court went seriously awry in assessing the constitutionality of § 3404.

Appellees' first claim, accepted by the District Court, is that the statutory fee limitation, as it bears on the administrative scheme in operation, deprives a rejected claimant or recipient of "life, liberty or property, without due process of law," U.S. Const., Amdt. 5, by depriving him of representation by expert legal counsel.[8] Our decisions establish that "due process" is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur. See *Mathews, supra*, at 334; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In defining the process necessary to ensure "fundamental fairness" we have recognized that the Clause does not require that "the procedures used to guard against an erroneous deprivation ... be so comprehensive as to preclude any possibility of error," *Mackey v. Montrym*, 443 U.S. 1, 13 (1979), and in addition we have em-

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8 The District Court held that applicants for benefits, no less than persons already receiving them, had a "legitimate claim of entitlement" to benefits if they met the statutory qualifications. The court noted that this Court has never so held, although this Court has held that a person receiving such benefits has a "property" interest in their continued receipt. See *Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976). Since at least one of the claimants here alleged a diminution of benefits already being received, however, we must in any event decide whether "due process" under the circumstances includes the right to be represented by employed counsel. In light of our decision on that question, *infra*, at 334, we need not presently define what class would be entitled to the process requested.

phasized that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard. See *Mathews*, 424 U.S., at 348.[9]

These general principles are reflected in the test set out in *Mathews*, which test the District Court purported to follow, and which requires a court to consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system. *Id.*, at 335. In applying this test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, at 344; see also *Parham v. J.R.*, 442 U.S. 584, 612-613 (1979).

The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer. See *United States v. Hall*, 98 U.S. 343, 352-355 (1879). This purpose is reinforced by a similar absolute prohibition on compensation of

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[9] See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1276 (1975):

"It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving."

any service organization representative. 38 U.S.C. 3402(b)(1). While Congress has recently considered proposals to modify the fee limitation in some respects, a Senate Committee Report in 1982 highlighted that body's concern that "any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of non-attorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." S. Rep. No. 97-466, p. 49 (1982). Although this same Report professed the Senate's belief that the original stated interest in protecting veterans from unscrupulous lawyers was "no longer tenable," the Senate nevertheless concluded that the fee limitation should with a limited exception remain in effect, in order to "protect claimants' benefits" from being unnecessarily diverted to lawyers."[10]

In the face of this congressional commitment to the fee limitation for more than a century, the District Court had only this to say with respect to the governmental interest:

> "The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests. To the extent the paternalistic role is valid, there are less drastic means available to

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[10] JUSTICE STEVENS' dissent quotes liberally from this same Senate Committee Report, *post*, at 365-366, apparently intending to suggest that the Committee determined that the fee limitation was no longer justified. The quote is taken out of context, and as such it is quite misleading. The bill with respect to which the Report was issued would have provided for the first time for limited judicial review of BVA decisions. To this end, the Committee determined that "some easing of the limitation on attorneys' fees" would be necessary to allow a claimant to pursue an effective appeal in the federal courts. *But the proposed bill retained the fee limitation for all VA proceedings up to and including the first denial of a claim by the BVA.* In the sections of the Report not quoted by JUSTICE STEVENS the Committee explained that the limitation was retained to "protect claimant's benefits," and because until judicial review was contemplated there was "no need" for attorneys. S. Rep. No. 97-466, p. 50 (1982). Finally, it is worth noting that in any event the proposed bill died in House Committee and thus was never enacted.

ensure that attorneys' fees do not deplete veterans' death or disability benefits." 589 F. Supp., at 1323.

It is not for the District Court or any other federal court to invalidate a federal statute by so cavalierly dismissing a long-asserted congressional purpose. If "paternalism" is an insignificant Government interest, then Congress first went astray in 1792, when by its Act of March 23 of that year it prohibited the "sale, transfer or mortgage ... of the pension ... [of a] soldier ... before the same shall become due." Ch. 11, Section 6, 1 Stat. 245. Acts of Congress long on the books, such as the Fair Labor Standards Act, might similarly be described as "paternalistic"; indeed, this Court once opined that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual ..." *Lochner v. New York*, 198 U.S. 45, 61 (1905). That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal.

There can be little doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it. Attorneys would be freely employable by claimants to veterans' benefits, and the claimant would as a result end up paying part of the award, or its equivalent, to an attorney. But this would not be the only consequence of striking down the fee limitation that would be deleterious to the congressional plan.

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expedient of informality, but surely Congress desired that the proceedings be as informal

and nonadversarial as possible.[11] The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. Describing the prospective impact of lawyers in probation revocation proceedings, we said in *Gagnon v. Scarpelli*, 411 U.S. 778, 787-788 (1973):

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself ... may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual. ... Certainly, the decisionmaking process will be pro-

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[11] The District Court stated in its opinion that "both claimants and attorneys familiar with the VA system view that system as adversarial. ..." 589 F. Supp., at 1321. In reaching this conclusion, the District Court referred to statements by two attorneys and two claimants. One of the attorneys was admitted to practice in California in 1978, but does not take claims before the VA because of the fee limitation. His familiarity with VA procedures was acquired as a certified representative before the VA for appellee Swords to Ploughshares during his time as a law student. The second attorney was admitted to practice in Wisconsin in 1981, and has been a staff member of appellee Swords to Ploughshares since 1980. His representation of veterans has been primarily before discharge boards, but in the course of this representation he has become familiar with VA rules and practices. Both stated that they regarded the VA procedures as "adversarial." Two claimants testified on the basis of their own experience, one that the VA had been "very adversarial" and the other that "the VA has opposed me at every turn. ..."

Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations.

longed, and the financial cost to the State—for appointed counsel, ... a longer record, and the possibility of judicial review—will not be insubstantial."

We similarly noted in *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), that the use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast. ..."

Knowledgeable and thoughtful observers have made the same point in other language:

"To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one, or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

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"These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. ... While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month."

Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1287-1290 (1975).

Thus, even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

We accordingly conclude that under the *Mathews v. Eldridge* analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. See *Parham v. J. R.*, 442 U.S., at 608, n. 16. It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the District Court.

As indicated by the statistics set out earlier in this opinion, more than half of the 800,000 claims processed annually by the VA result in benefit awards at the regional level. An additional

10,000 claims succeed on request for reconsideration at the regional level, and of those that do not, 36,000 are appealed to the BVA. Of these, approximately 16% succeed before the BVA. It is simply not possible to determine on this record whether any of the claims of the named plaintiffs, or of other declarants who are not parties to the action, were wrongfully rejected at the regional level or by the BVA, nor is it possible to quantify the "erroneous deprivations" among the general class of rejected claimants. If one regards the decision of the BVA as the "correct" result in every case, it follows that the regional determination against the claimant is "wrong" in the 16% of the cases that are reversed by the Board.

Passing the problems with quantifying the likelihood of an erroneous deprivation, however, under *Mathews* we must also ask what value the proposed additional procedure may have in reducing such error. In this case we are fortunate to have statistics that bear directly on this question, which statistics were addressed by the District Court. These unchallenged statistics chronicle the success rates before the BVA depending on the type of representation of the claimant, and are summarized in the following figures taken from the record. App. 568.

ULTIMATE SUCCESS RATES BEFORE THE BOARD OF VETERANS' APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other Non-attorney	15.8%
No Representation	15.2%
Attorney/Agent	18.3%

The District Court opined that these statistics were not helpful, because in its view lawyers were retained so infrequently that no body of lawyers with an expertise in VA practice had developed, and lawyers who represented veterans regularly might do better than lawyers who represented them only *pro bono* on a sporadic basis. The District Court felt that a more reliable index of the effect lawyers would have on the

proceedings was a statistical study showing success of various representatives in appeals to discharge review boards of the uniformed services—statistics that showed a significantly higher success rate for those claimants represented by lawyers as compared to those claimants not so represented.

We think the District Court's analysis of this issue totally unconvincing, and quite lacking in the deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress. We have the most serious doubt whether a competent lawyer taking a veteran's case on a *pro bono* basis would give less than his best effort, and we see no reason why experience in developing facts as to causation in the numerous other areas of the law where it is relevant would not be readily transferable to proceedings before the VA. Nor do we think that lawyers' success rates in proceedings before military boards to upgrade discharges—proceedings which are not even conducted before the VA, but before military boards of the uniformed services—are to be preferred to the BVA statistics which show reliable success by mode of representation in the very type of proceeding to which the litigation is devoted.

The District Court also concluded, apparently independently of its ill-founded analysis of the claim statistics, (1) that the VA processes are procedurally, factually, and legally complex, and (2) that the VA system presently does not work as designed, particularly in terms of the representation afforded by VA personnel and service representatives, and that these representatives are "unable to perform all of the services which might be performed by a claimant's own paid attorney." 589 F. Supp., at 1322. Unfortunately the court's findings on "complexity" are based almost entirely on a description of the plan for administering benefits in the abstract, together with references to "complex" cases involving exposure to radiation or agent orange, or post-traumatic stress syndrome. The court did not attempt to state even approximately how often procedural or substantive complexities arise in the run-of-the-mine case, or even in the unusual case. The VA procedures cited by the court do permit a claimant to prejudice his

rights by failing to respond in a timely manner to an agency notice of denial of an initial claim, but despite this possibility there is nothing in the District Court's opinion indicating that these procedural requirements have led to an unintended forfeiture on the part of a diligent claimant. On the face of the procedures, the process described by the District Court does not seem burdensome: one year would in the judgment of most be ample time to allow a claimant to respond to notice requesting a response. In addition, the VA is required to read any submission in the light most favorable to the claimant, and service representatives are available to see that various procedural steps are complied with. It may be that the service representative cannot, as the District Court hypothesized, provide all the services that a lawyer could, but there is no evidence in the record that they cannot or do not provide advice about time limits.

The District Court's opinion is similarly short on definition or quantification of "complex" cases. If this term be understood to include all cases in which the claimant asserts injury from exposure to radiation or agent orange, only approximately 3 in 1,000 of the claims at the regional level and 2% of the appeals to the BVA involve such claims. Nor does it appear that all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases, for example, are disposed of because the medical examination reveals no disability. What evidence does appear in the record indicates that the great majority of claims involve simple questions of fact, or medical questions relating to the degree of a claimant's disability; the record also indicates that only the rare case turns on a question of law. There are undoubtedly "complex" cases pending before the VA, and they are undoubtedly a tiny fraction of the total cases pending. Neither the District Court's opinion nor any matter in the record to which our attention has been directed tells us more than this.

The District Court's treatment of the likely usefulness of attorneys is on the same plane with its efforts to quantify the likelihood of error under the present system. The court states

several times in its opinion that lawyers could provide more services than claimants presently receive—a fact which may freely be conceded—but does not suggest how the availability of these services would reduce the likelihood of error in the run-of-the-mine case. Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment. Cf. *Parham v. J.R.*, 442 U.S., at 609-612. The availability of particular lawyers' services in so-called "complex" cases might be more of a factor in preventing error in such cases, but on this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up. Even if the showing in the District Court had been much more favorable, appellees still would confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional defini-

tion sufficient for all of them. But here appellees have failed to make the very difficult factual showing necessary.[12]

Reliable evidence before the District Court showed that claimants represented by lawyers have a slightly better success rate before the BVA than do claimants represented by service representatives, and that both have a slightly better success rate than claimants who were not represented at all. Evidence also showed that there may be complex issues of causation in comparatively few of the hundreds of thousands of cases before the VA, but there is no adequate showing of the effect the availability of lawyers would have on the proper disposition of these cases. Neither the difference in success rate nor the existence of complexity in some cases is sufficient to warrant a

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12 Our understanding of the operation of the claims process is further bolstered by the findings of the Senate Committee alluded to earlier. As noted *supra*, at 322, that Committee conducted an extensive inquiry into the process in connection with several proposed bills that would have provided for judicial review of BVA decisions, and also would have withdrawn the fee limitation for proceedings occurring after the first denial by the BVA, while retaining the limitation for proceedings prior to that time. The Committee Report accompanying a 1982 bill noted its belief that the claims process presently operates informally and nonadversarially, that there was no evidence that most claimants were not satisfied with the VA's resolution of their claims, that there was in general "no need" for attorneys inasmuch as applying for benefits was a "relatively uncomplicated procedure," and that the service organizations afforded a "high quality of representation." S. Rep. No. 97-466, pp. 25, 49-50 (1982). Each bill unanimously passed the Senate, but died in House Committee, leaving the present system in operation. See S. 349, 97th Cong., 2d Sess (1982); S. 636, 98th Cong., 1st Sess. (1983).

When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue. See *Rostker v. Goldberg*, 453 U.S. 57, 72-73 (1981); *Vance v. Bradley*, 440 U.S. 93, 111-112 (1979); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Because we do not believe the record in the District Court contradicted these findings, however, we need not rely on them, or determine what deference must be afforded on this congressional record; we mention the Committee's findings only because they are entirely consistent with our understanding of the record developed in the District Court.

conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment.

We have in previous cases, of course, held not only that the Constitution permits retention of an attorney, but also that on occasion it requires the Government to provide the services of an attorney. The Sixth Amendment affords representation by counsel in all criminal proceedings, and in cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), we have held that this provision requires a State prosecuting an indigent to afford him legal representation for his defense. No one would gainsay that criminal proceedings are adversarial in nature, and of course the Sixth Amendment applies only to such proceedings.

In cases such as *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), we observed that counsel can aid in identifying legal questions and presenting arguments, and that one charged with probation violation may have a right to counsel because of the liberty interest involved. We have also concluded after weighing the *Mathews* factors that the right to appointed counsel in a case involving the threatened termination of parental rights depends upon the circumstances of each particular case, see *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), while three of the dissenters thought the same balancing required appointment of counsel in all such cases. *Id.*, at 35 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

But where, as here, the only interest protected by the Due Process Clause is a property interest in the continued receipt of Government benefits, which interest is conferred and terminated in a nonadversary proceeding, these precedents are of only tangential relevance. Appellees rely on *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court held that a welfare recipient subject to possible termination of benefits was entitled to be represented by an attorney. The Court said that "counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.*, at 270-271. But in

defining the process required the Court also observed that "the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. ... His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." *Id.*, at 264 (emphasis in original).

We think that the benefits at stake in VA proceedings, which are not granted on the basis of need, are more akin to the Social Security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistence. Just as this factor was dispositive in *Mathews* in the Court's determination that no evidentiary hearing was required prior to a temporary deprivation of benefits, 424 U.S., at 342-343, so we think it is here determinative of the right to employ counsel. Indeed, there appears to have been no stated policy on the part of New York in *Goldberg* against permitting an applicant to divide up his welfare check with an attorney who had represented him in the proceeding; the procedures there simply prohibited personal appearance of the recipient with or without counsel and regardless of whether counsel was compensated, and in reaching its conclusion the Court relied on agency regulations allowing recipients to be represented by counsel under some circumstances. 424 U.S., at 342-343.

This case is further distinguishable from our prior decisions because the process here is not designed to operate adversarially. While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof, the need for counsel is considerably diminished. We have expressed similar concerns in other cases holding that counsel is not required in various proceedings that do not approximate

trials, but instead are more informal and nonadversary. See *Parham v. J. R.*, 442 U.S., at 608-609; *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Wolff v. McDonnell*, 418 U.S., at 570.

Thus none of our cases dealing with constitutionally required representation by counsel requires the conclusion reached by the District Court. Especially in light of the Government interests at stake, the evidence adduced before the District Court as to success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the congressional fee limitation under consideration here violates the Due Process Clause of the Fifth Amendment. What evidence we have been pointed to in the record regarding complex cases falls far short of the kind which would warrant upsetting Congress' judgment that this is the manner in which it wishes claims for veterans' benefits adjudicated. *Schweiker v. McClure*, 456 U.S. 188, 200 (1982); *Mathews*, 424 U.S., at 344, 349. The District Court abused its discretion in holding otherwise.

IV

Finally, we must address appellees' suggestion that the fee limitation violates their First Amendment rights. Appellees claim that cases such as *Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), establish for individuals and organizations a right to ensure "meaningful access to courts" for themselves or their members, and that the District Court was correct in holding that this right was violated by the fee limitation. There are numerous conceptual difficulties with extending the cited cases to cover the situation here; for example, those cases involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across-the-board to individuals and organizations alike.

But passing those problems, appellees' First Amendment arguments, at base, are really inseparable from their due process claims. The thrust is that they have been denied "meaningful access to the courts" to present their claims. This must be based in some notion that VA claimants, who presently are allowed to speak in court, and to have someone speak for them, also have a First Amendment right to pay their surrogate speaker;[13] beyond that questionable proposition, however, even as framed appellees' argument recognizes that such a First Amendment interest would attach only in the absence of a "meaningful" alternative. The foregoing analysis of appellees' due process claim focused on substantially the same question—whether the process allows a claimant to make a meaningful presentation—and we concluded that appellees had such an opportunity under the present claims process, and that significant Government interests favored the limitation on "speech" that appellees attack. Under those circumstances appellees' First Amendment claim has no independent significance. The decision of the District Court is accordingly

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion and its judgment because I agree that this Court has appellate jurisdiction under 28 U.S.C. § 1252 and that the District Court abused its discretion in issuing a nationwide preliminary injunction against enforcement of the $10 fee limitation in 38 U.S.C. § 3404(c). I also agree that the record before us is insufficient to evaluate the claims of

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13 "The dissent quotes from our decision in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985), *post*, at 364, n. 13, as if the analysis in that case answers the issues raised here. One would think that another proposition "so obvious that [it] seldom need[s] to be stated explicitly," *post*, at 368, n. 16, is that the constitutional analysis of a regulation that restricts core political speech, such as the regulation at issue in FEC, will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings.

any individuals or identifiable groups. I write separately to note that such claims remain open on remand.

The grant of appellate jurisdiction under § 1252 does not give the Court license to depart from established standards of appellate review. This Court, like other appellate courts, has always applied the "abuse of discretion" standard on review of a preliminary injunction. See, *e. g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). As the Court explains, direct appeal of a preliminary injunction under § 1252 is appropriate in the rare case such as this where a district court has issued a nationwide injunction that in practical effect invalidates a federal law. In such circumstances, § 1252 "assure[s] an expeditious means of affirming or removing the restraint on the Federal Government's administration of the law. ..." *Heckler v. Edwards*, 465 U.S. 870, 882 (1984). See also *id.*, at 881, nn. 15 and 16 (§ 1252 is closely tied to the need to speedily resolve injunctions preventing the effectuation of Acts of Congress). Contrary to the suggestion of JUSTICE BRENNAN, *post*, at 355, the Court fully effectuates the purpose of § 1252 by vacating the preliminary injunction which the District Court improperly issued. Since the District Court did not reach the merits, any cloud on the constitutionality of the $10 fee limitation that remains after today's decision is no greater than exists prior to judgment on the merits in any proceeding questioning a statute's constitutionality.

A preliminary injunction is only appropriate where there is a demonstrated likelihood of success on the merits. *Doran v. Salem Inn, Inc., supra.* In order to justify the sort of categorical relief the District Court afforded here, the fee limitation must pose a risk of erroneous deprivation of rights in the generality of cases reached by the injunctive relief. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Given the nature of the typical claim and the simplified Veterans' Administration procedures, the record falls short of establishing any likelihood of such sweeping facial invalidity. *Ante*, at 329-330.

As the Court observes, the record also "is ... short on definition or quantification of 'complex' cases" which might constitute a "group" with respect to which the process pro-

vided is "[in]sufficient for the large majority." *Ante*, at 329, 330; *Parham v. J.R.*, 442 U.S. 584, 617 (1979). The "determination of what process is due [may] var[y]" with regard to a group whose "situation differs" in important respects from the typical veterans' benefit claimant. *Parham v. J.R., supra*, at 617. Appellees' claims, however, are not framed as a class action nor were the lower court's findings and relief narrowly drawn to reach some discrete class of complex cases. In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans "'[a] hearing appropriate to the nature of the case.'" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Ante*, at 329.

Nevertheless, it is my understanding that the Court, in reversing the lower court's preliminary injunction, does not determine the merits of the appellees' individual "as applied" claims. The complaint indicates that appellees challenged the fee limitation both on its face and as applied to them, and sought a ruling that they were entitled to a rehearing of claims processed without assistance of an attorney. I App. 39-42. Appellee Albert Maxwell, for example, alleges that his service representative retired and failed to notify him that he had dropped his case. Mr. Maxwell's records indicate that he suffers from the after effects of malaria contracted in the Bataan death march as well as from multiple myelomas allegedly a result of exposure to radiation when he was a prisoner of war detailed to remove atomic debris in Japan. *Id.*, at 45-89. Maxwell contends that his claims have failed because of lack of expert assistance in developing the medical and historical facts of his case. As another example, Doris Wilson, a widow who claims her husband's cancer was contracted from exposure to atomic testing, alleges her service representative waived her right to a hearing because he was unprepared to represent her. She contends her claim failed because she was unable without assistance to obtain service records and medical information. *Id.*, at 217.

The merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage. Though the Court concludes that denial of expert representation is not "*per se* unconstitutional," given the availability of service representatives to assist the veteran and the Veterans' Administration boards' emphasis on non-adversarial procedures, "[o]n remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in this opinion." *Parham v. J.R., supra*, at 616-617.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today concludes that it has mandatory jurisdiction pursuant to 28 U.S.C. § 1252 directly to review the District Court's entry of a preliminary injunction restraining the Government from enforcing the provisions of 38 U.S.C. §§ 3404 and 3405 pending a full trial on the merits of appellees' contention that those statutes violate the First and Fifth Amendments. *Ante*, at 316-319.[1] The Court then proceeds to sustain the constitutionality of those statutes on the ground that "the process allows a claimant to make a meaningful presentation" on behalf of his claim for service-connected death and disability benefits even without the assistance of his attorney. *Ante*, at 335. The Court having reached this issue, I feel constrained to note my strong disagreement on the merits for the reasons eloquently set forth in JUSTICE STEVENS' dissent, which I join.

I write separately, however, because I believe the Court's exercise of appellate jurisdiction in this case is not authorized by § 1252. Because the District Court's interlocutory order granting a preliminary injunction did not constitute a decision

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[1] Title 38 U.S.C. § 3404 prohibits a veteran or his survivors from paying more than $10 to an attorney for assistance in attempting to obtain service-connected death and disability benefits, and § 3405 provides that any attorney who receives more than $10 in these circumstances "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

striking down the challenged statutes on constitutional grounds, appellate review of the propriety and scope of the preliminary injunction instead rests initially in the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(a)(1), from which review in this Court could then be sought through a petition for a writ of certiorari. The Court's decision to the contrary is wholly inconsistent with the purpose and history of § 1252, well-established principles respecting interlocutory review of preliminary injunctions, and common sense.

I

The District Court did not hold that §§ 3404 and 3405 are unconstitutional either on their face or as applied. Instead, for purposes of considering the appellees' motion for a pretrial preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, it found that appellees had "demonstrated a high likelihood of prevailing" on the merits of their due process and First Amendment challenges. 589 F. Supp. 1302, 1323 (ND Cal. 1984); see also *id.*, at 1307, 1327, 1329. The court then weighed the potential for irreparable injury and the balance of hardships in light of this likelihood of success. It found that the appellees had "shown the irreparable injury necessary to obtain injunctive relief" and concluded that "the balance of hardship also weighs heavily in [their] favor."

Id., at 1329.[2] Accordingly, the court entered a broad preliminary injunction restraining enforcement of the challenged statutes "pending a trial on the merits of the above-entitled action." *Ibid.* As this Court was advised at oral argument, the appellees contemplate further extensive discovery and a full trial on the underlying First and Fifth Amendment issues. Tr. of Oral Arg. 31-32.[3]

Contrary to the Court's assertion, there is much more than a "semantic difference" between a finding of likelihood of success sufficient to support preliminary relief and a final holding on the merits. *Ante*, at 317. Until today, the Court always has recognized that district court findings on "likelihood of suc-

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2 The court noted that "the government has submitted absolutely no evidentiary support" for its claim of potential hardship from the entry of preliminary relief. 589 F. Supp., at 1328, n. 23. Appellees, on the other hand, had pointed to a number of alleged hardships in support of their motion: (1) "a substantial number of SCDDC Claimants who would be forced to proceed without a lawyer during the pendency of this litigation would go on to lose or abandon their claims"; (2) "the fee limitation exacts a heavy toll in terms of Claimants' ability to petition the V.A. for a redress of grievances, access to the V.A., and fundamental rights of free speech and association," it being well established that the "loss of First Amendment freedoms, even temporarily, constitutes irreparable injury"; and (3) "many veterans, and particularly those whose cancer claims arise out of radiation or Agent Orange exposure such as Maxwell, Cordray and Warehime, may die prior to trial on the merits. For these veterans, the instant motion is their only opportunity for redress. Indeed, one of the intended plaintiffs herein, Charles Targett, died of brain cancer before this action could even be filed." Plaintiffs' Memorandum of Points and Authorities in Support of Application for a Preliminary Injunction, No. C-83-1861 MHP, pp. 17-19 (ND Cal. Nov. 14, 1983) (emphasis added) (Preliminary Injunction Memorandum). See also Exhibit E, Declaration of Gordon P. Erspamer ¶ 3, attached to Preliminary Injunction Memorandum ("Based upon my knowledge of the medical conditions of Messrs. Maxwell, Cordray and Warehime, and my acquaintance with their medical records, I believe, regrettably, there is a substantial possibility that one or more of them will not survive through trial").

3 As the District Court observed, "[a]t oral argument [before that court] attorneys for both plaintiffs and defendants agreed that this was a motion solely for preliminary injunctive relief and not for permanent injunctive relief." 589 F. Supp., at 1307, n. 5.

cess on the merits" are *not* "tantamount to decisions on the underlying merits"; the two are "significantly different." *University of Texas v. Camenisch*, 451 U.S. 390, 393-394 (1981). Preliminary injunctions are granted on the basis of a broad "balance of factors" determined through "procedures that are less formal and evidence that is less complete than in a trial on the merits," and the parties are accorded neither "a full opportunity to present their cases nor ... a final judicial decision based on the actual merits of a controversy." *Id.*, at 395-396 (emphasis added). District court orders granting preliminary injunctions may therefore be reviewed only on an abuse-of-discretion standard: an appellate court may conclude that the district court's preliminary relief sweeps too broadly, or is based on an improper balancing of hardships, or even that the likelihood of success has been overdrawn. See generally *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *Brown v. Chote*, 411 U.S. 452, 457 (1973). But under the abuse-of-discretion standard, appellate courts obviously may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran v. Salem Inn, Inc., supra*, at 934; *Brown v. Chote, supra*, at 457.[4] For several reasons, this is particularly true where "grave, far-reaching constitutional questions" are presented: the records developed in preliminary-injunction cases are "simply insufficient" to allow a final decision on the merits; as a matter of fairness the litigants are entitled to a full evidentiary presentation before a final decision is reached; and where questions of constitutional law turn on disputed fact,[5] such decisions must initially be rendered by a district court factfinder. *Brown v. Chote, supra*, at 457.

Section 1252 does not empower this Court directly to police the preliminary-injunctive process in the district courts.

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4 See generally *United States v. Corrick*, 298 U.S. 435 (1936); *Alabama v. United States*, 279 U.S. 229 (1929); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U.S. 322 (1929); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States §§ 196, 208, 217 (1951).

5 As in the due process balancing inquiry conducted by the District Court in this case pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Instead, it was enacted to ensure the "prompt determination by the court of last resort of disputed questions of the *constitutionality* of acts of the Congress."[6] Whether one relies on the codified language—permitting a direct appeal from a lower-court decision *"holding* an Act of Congress unconstitu-

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6 H. R. Rep. No. 212, 75th Cong., 1st Sess., 2 (1937) (emphasis added). See also H. R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. (1937); S. Rep. No. 963, 75th Cong., 1st Sess. (1937). Remarks during floor debate reinforce the conclusion that § 1252 was intended to provide mandatory Supreme Court review only where the underlying constitutional issue was properly presented for dispositive resolution. See, *e. g.*, 81 Cong. Rec. 3254 (1937) (remarks of Rep. Sumners) (provision would enable an appeal "directly to the Supreme Court from an adverse decision on the question of constitutionality"); *id.*, at 3256 (remarks of Rep. Brewster) (provision designed to "obviate delays in our courts so far as determination of constitutional questions is concerned"); *id.*, at 3260-3261 (remarks of Rep. Sumners) (case "would come up on the question of constitutionality; "[w]hen the question of the constitutionality of an act of Congress is raised, and it is a serious question, it is the judgment of the members of the committee that that question ought to be presented to the Supreme Court just as quickly as it can be carried there properly"); *id.*, at 3267 (remarks of Rep. McFarlane) (provision would "expedite the testing of the constitutionality of acts of Congress"); *id.*, at 3272 (remarks of Rep. Sumners) ("where ... the decision is adverse to the constitutionality of the act in question, the Government, in such event, may appeal directly to the Supreme Court in order to expedite the determination of the constitutional question"). See also Frankfurter & Fisher, The Business of the Supreme Court at the October Terms, 1935 and 1936, 51 Harv. L. Rev. 577, 614, 616-617 (1938) (the "essence" of the legislation now codified as § 1252 was to ensure "a speedy test" of the constitutionality of a federal statute by promptly "securing the final word from the Supreme Court").

tional"[7]—or on the original language of the statute—permitting a direct appeal where "the decision is *against* the constitutionality of any Act of Congress"[8]—it is obvious that § 1252 contemplates a fully consummated lower-court decision of unconstitutionality so that this Court may carry out the statutory purpose of rendering a prompt and dispositive determi-

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7 Title 28 U.S.C. § 1252 provides in full:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

8 The Judiciary Act of 1937, § 2, 50 Stat. 752, provided in full:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

nation respecting the constitutionality of the challenged legislation. Jurisdiction pursuant to § 1252 accordingly is proper *only* where "the basis of the decision below *in fact* was that the Act of Congress was unconstitutional," *United States v. Rainies*, 362 U.S. 17, 20 (1960) (emphasis added)[9]—and "likelihood" simply does not equate with "in fact." Where a district court merely has concluded that there is a "likelihood" of unconstitutionality sufficient to support temporary relief, § 1252's underlying purpose cannot be fulfilled because this Court (if faithful to precedent) cannot resolve the "ultimate merits" of the underlying constitutional issue. *Doran v. Salem Inn Inc.*, 422 U.S., at 934; *Brown v. Chote*, 411 U.S., at 457. Instead, all the Court could do would be to consider whether the nature or scope of preliminary relief constituted abuses of discretion, and perhaps to disagree with the district court respecting the "likelihood" that the appellees ultimately would prevail. In my opinion, these questions relating to the supervision of the injunctive process are not subsumed in § 1252 and properly are left in the first instance to the courts of appeals.

The Court argues, however, that because § 1252 explicitly grants jurisdiction to this Court "from an *interlocutory* or final judgment" of unconstitutionality, Congress surely intended to include preliminary injunctions granted on "likelihood of success" within the scope of § 1252. *Ante*, at 316317, 318-319. The Court reinforces this argument by noting that *all* interlocutory decisions, even if cast in dispositive terms, "are subject to revision" before entry of final judgment. *Ante*, at 317. This argument is wholly unpersuasive. As demonstrated by the large body of precedent applying 28 U.S.C. §§ 1291 and 1292(a), there is a substantial difference between interlocutory decisions that are "tentative, informal or incomplete"[10] and those

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9 See also *Heckler v. Edwards*, 465 U.S. 870, 877 (1984); *McLucas v. DeChamplain*, 421 U.S. 21, 30-31 (1975); *United States v. Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-566 (1972) (*per curiam*); *Fleming v. Rhodes*, 331 U.S. 100, 103-104 (1947); *Garment Workers v. Donnelly Garment Co.*, 304 U.S. 243, 249 (1938).

10 *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

that for all practical purposes "conclusively determine the disputed question."[11] Interlocutory decisions falling within the latter category may, in a small set of circumstances, be immediately appealed because they represent "fully consummated decisions" on the matter in question that are capable of being reviewed and dispositively affirmed or reversed."[12] The "bare fact"[13] that every order short of a final decree is theoretically "subject to reopening at the discretion of the district judge" is insufficient to preclude review in these circumstances."[14] Instead, interlocutory appeals to the courts of appeals pursuant to §§ 1291 and 1292(a) are proper when no further consideration of the disputed issue is contemplated by the district court and when, as a practical matter, there is "no basis to suppose" that the resolution is anything less than definite.[15]

Where the disputed decision "remains open, unfinished or inconclusive," on the other hand, it is well established that under §§ 1291 and 1292(a) "there may be no intrusion by appeal" of the unresolved issue.[16] The reasons are manifest. If the appellate court addressed the issue in such an inconclusive posture, it either would render an advisory opinion that had no binding effect or, if binding effect were intended, would usurp the authority of the district court to pass on the issue in

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11 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

12 *Abney v. United States*, 431 U.S. 651, 659 (1977).

13 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3911, p. 470 (1976) (Wright, Miller, & Cooper).

14 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 12 (1983).

15 *Id.*, at 13. See generally *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981); *United States v. MacDonald*, 435 U. S. 850, 854-855 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974).

16 *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S., at 546.

the first instance. "Appeal gives the upper court a power of review, not one of intervention."[17]

This elementary distinction applies with direct force to appeals pursuant to § 1252.[18] Where a district court issues an interlocutory order based on a fully consummated determination that a federal statute is unconstitutional, an appeal is proper because the constitutional question can authoritatively be decided with dispatch. Thus in *Fleming v. Rhodes*, 331 U.S. 100, 102 (1947), the District Court had denied preliminary relief enjoining the eviction of tenants on the ground that the federal statute prohibiting the evictions was unconstitutional. And in *McLucas v. DeChamplain*, 421 U.S. 21, 26-27 (1975), the District Court for the District of Columbia had preliminarily enjoined the enforcement of a statute in reliance on a decision by the Court of Appeals for the District of Columbia Circuit that the statute was unconstitutional—"a decision," we noted, that was "binding on the District Court," *id.*, at 28. In neither case was there any basis to believe that the interlocutory holding of unconstitutionality was anything but final.

On the other hand, we have never in the 48-year history of § 1252 assumed jurisdiction where the district court had done no more than simply determine that there was a "likelihood" of unconstitutionality sufficient to support temporary relief pending a final decision on the merits. Because such determinations are inherently "open, unfinished [and] inconclusive,"[19] the only proper questions for immediate appellate consideration would be whether the entry and scope of pre-

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[17] *Ibid.* See also *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.) ("[I]t is a final decision that Congress has made reviewable.... While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment") (emphasis in original).

[18] Similar distinctions have evolved concerning the scope of our jurisdiction over "final" state-court judgments or decrees pursuant to 28 U.S.C. § 1257. See, *e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975); *Construction Laborers v. Curry*, 371 U.S. 542, 548-551 (1963).

[19] *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, at 546.

liminary relief were abuses of discretion. But such review is not the purpose of § 1252 because, as the Court today concedes, "it was the *constitutional* question that Congress wished this Court to decide." *Ante*, at 318 (emphasis added).[20] If the Court did address the constitutional issue in these circumstances, it either would be rendering an advisory opinion subject to revision once the district court reached the merits or, to the extent it purported to pass on the issue with finality, would be exercising a forbidden "power ... of intervention" rather than of review.[21] We have long recognized that such

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[20] When Congress created the exceptional right to bypass the court of appeals, it directly linked that right to a lower court's invalidation of an Act of Congress. Although it is in the nature of cases and controversies that the court's judgment may address not only the issue of statutory constitutionality, but other issues as well, such as attorney's fees, *remedy*, or related state-law claims, the natural sense of the jurisdictional provision is that *the holding of statutory unconstitutionality, not these other issues, is what Congress wished this Court to review in the first instance.*

"Because direct review, is linked to a court's holding a federal statute unconstitutional, the logical test of which appeals from a judgment must be brought directly to this Court and which, standing alone, must follow the normal route of appellate review, *is whether the issue on appeal is the holding of statutory unconstitutionality.*" *Heckler v. Edwards*, 465 U.S. at 880 (emphasis added).

[21] *Cohen v. Beneficial Industrial Loan Corp., supra*, at 546.

intervention is barred under §§ 1291 and 1292(a), and should have so recognized here as well.[22]

The Court contends, however, that the District Court in this case enjoined the challenged statute "across the country and under all circumstances," and that immediate mandatory appeal to this Court therefore "is in accord with the purpose of the statutory grant"—provision of "an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act." *Ante*, at 318-319. See also *ante*, at 336-337 (O'CONNOR, J., concurring). Congress unquestionably intended by § 1252 to provide an "expeditious" means for resolving constitutional questions,[23] but an appeal is proper only when it is those questions themselves that have been decided a condition not met in preliminary-injunction cases where, as here, we may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran v. Salem Inn, Inc.*, 422 U.S., at 934.

Moreover, the Court's reasoning sweeps both too narrowly and too broadly. It sweeps too narrowly because mandatory

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22 The Court argues that the finality issue is a "bit of a red herring" given that the original version of § 1252, see n. 8, *supra*, provided jurisdiction over decisions "against the constitutionality of any Act of Congress," and that "[a]ny fair reading of the decision at issue would conclude that it is 'against the constitutionality of the challenged statutes. *Ante*, at 318. I disagree. *Every* district court order in litigation such as this that denies a motion to dismiss or for summary judgment, grants a temporary restraining order, see n. 26, *infra*, or even allows discovery to proceed based on the substantiality of the plaintiff's claim could be characterized as being "against" the validity of a statute in the sense that it is not squarely "for" the statute, else the litigation would be terminated. Preliminary injunctions based on "likelihood" of success do, to be sure, represent a more definite degree of doubt respecting the statute than, say, an order denying summary judgment based on "genuine issues" remaining. Cf. Fed. Rule Civ. Proc. 56(c). But these are differences of degree and not of kind. A decision cannot squarely be "against" the constitutionality of a statute if the constitutional question is still "open, unfinished [and] inclusive." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

23 See legislative history discussed in n. 6, *supra*.

jurisdiction pursuant to § 1252 is not confined to district court decisions striking down statutes "across the country and under all circumstances." *Ante*, at 319. See also *ante*, at 336 (O'CONNOR, J., concurring). We have instead long recognized that § 1252 requires that we review decisions that simply invalidate challenged statutes even as applied only to particular individuals in particular circumstances.[24] Allowing an immediate appeal in these circumstances is thought to further the "great public interest" in securing "prompt determinations" of the validity of lower court precedent that might have binding effect in cases beyond the one at hand.[25] Where a district court simply has granted a preliminary injunction—or for that matter a temporary restraining order[26]—barring enforcement of a statute as applied to certain individuals, the precedential effect is far more obscure. Such orders are based on a case-specific balancing of the equities that may well not carry over into other situations. It is simply too burdensome for this Court to bear mandatory direct jurisdiction over every preliminary injunction, temporary restraining order, and other pretrial order in cases potentially implicating the constitutionality of federal statutes. The Court might respond that § 1252 appeals in this context can be limited to preliminary relief having nationwide impact, but this would be bootstrap reasoning without support in our precedents: the propriety of an appeal under § 1252 turns not on the scope of the potential

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24 See, *e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983); *California v. Grace Brethren Church*, 457 U.S. 393, 404-407 (1982); *United States v. Lee*, 455 U.S. 252, 256 (1982); *United States v. Darsmont*, 449 U.S. 292, 293 (1981) (per curiam).

25 *Fleming v. Rhodes*, 331 U.S. at 104.

26 Temporary restraining orders generally cannot be granted absent a showing of reasonable probability of eventual success on the merits although, as in preliminary-injunction cases, the degree of required probability may vary depending on the extent of irreparable injury and the balance of hardships. See 11 Wright, Miller, & Cooper § 2951, at 507-510. The Court's reasoning therefore extends without apparent limitation to all temporary restraining orders issued in litigation challenging the constitutionality of federal statutes.

impact, but on the underlying nature of the district court's determination."[27]

The Court's reasoning sweeps too broadly because there are means other than an expansive reading of § 1252 to ensure that improvident district court injunctions based on "likelihood of success" do not impede the effective functioning of the Federal Government. As Congress has emphasized, "[s]wift judicial review can be had in cases where the public interest requires it" through means short of mandatory appeals jurisdiction.[28] Pursuant to 28 U.S.C. § 1292(a), for example, the courts of appeals may promptly review district court orders granting or denying preliminary injunctions. Courts of appeals routinely supervise the trial-court injunctive process and are therefore in a far superior position to pass initially on questions of irreparable injury, balance of hardships, and abuse of discretion.[29] Moreover, if the question whether a

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[27] Congress did not enact an open-ended 'impact' test for determining which cases should come to this Court for direct review. Although remedial aspects of a case are important, the touchstone of direct appeal under § 1252 is not a party's or our own judgment of the significance of a decision. We exercise that judgment under our discretion to grant certiorari in any civil or criminal case before, as well as after, rendition of judgment. 28 U.S.C. § 1254(1); this Court's Rule 18. In § 1252, Congress mandated direct review not simply for decisions with impact, but rather for decisions whose impact was predicated upon" a lower-court holding that an Act of Congress is unconstitutional. *Heckler v. Edwards*, 465 U.S., at 884.

There is an additional reason why today's jurisdictional decision will bring every order granting preliminary relief in single as-applied cases directly before the Court: jurisdictional rules must be clear cut and cannot turn on indefinite notions of "importance" or "wide-ranging impact." "[L]itigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court." *Id.*, at 877.

[28] S. Rep. No. 94-204, p. 11 (1975). This Report pertained to Congress' repeal of the three-judge district court provisions of 28 U.S.C. § 2282 (1970 ed.), discussed *infra*, at 351-354, and nn. 32-35.

[29] See generally 7 J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice, ch. 65 (1985); 11 Wright, Miller, & Cooper §§ 2947-2950.

district court abused its discretion in issuing preliminary relief "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," this Court's Rule 18, certiorari review can be obtained before the court of appeals renders judgment. See 28 U.S.C. § 2101(e). This Court has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons.[30] Under this procedure, the Court has discretion to limit immediate review to exceptional cases and to leave initial review of most matters in the courts of appeals which of course "recognize the vital importance of the time element" in constitutional challenges involving the granting or denial of interlocutory relief.[31] Under today's construction of § 1252, however, the Court has no such discretion and accordingly has, I respectfully submit, expanded its mandatory docket to matters that we have no business resolving in the first instance.

One final consideration, based on the history of § 1252 and related provisions, sheds further light on the fallacy of the Court's jurisdictional reasoning. Section 1252 originally was enacted as § 2 of the Judiciary Act of 1937, 50 Stat. 752. Section 3 of that Act created the since-repealed three-judge district court provisions of 28 U.S.C. §§ 2282 (1970 ed.). Section 3 provided that "[n]o interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress" in cases challenging the constitutionality of the Act

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30 See, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 686-687 (1974) (certiorari granted before judgment by the Court of Appeals "because of the public importance of the issues presented and the need for their prompt resolution"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Ex parte Quirin*, 317 U.S. 1 (1942); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *United States v. Bankers Trust Co.*, decided together with *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935).

31 *Aaron v. Cooper*, 357 U.S. 566, 567 (1958); see also *Cooper v. Aaron*, 358 U.S. 1, 13 (1958).

could be granted unless presented to and resolved by a three-judge district court. That section also contained its own built-in jurisdictional authorization for direct Supreme Court review of any "order, decree, or judgment" issued by such a court granting or denying "an interlocutory or permanent injunction in such case." Moreover, § 3 provided that a single district judge could enter a "temporary stay or suspension, in whole or in part," of the enforcement of the challenged statute "until decision upon the application," provided that the applicant made a sufficient showing of, *inter alia*, "irreparable loss or damage."[32]

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32 Section 3 provided in full:

"No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as a district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding,

The history of § 3 is relevant to the instant question in two respects. First, this Court has held flatly that temporary relief granted by a single district judge pending the convening of a three-judge court is reviewable in the first instance by the courts of appeals and not on direct appeal to this Court. See, *e.g., Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 3 (1971) (*per curiam*) (preliminary relief "issued pursuant to [28 U.S.C. § 2284(3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U.S.C. §§ 1291 and 1292(a)").[33] It would have made no sense to channel appeals of such orders under § 3 to the courts of appeals while channeling appeals of *identical* preliminary orders in cases that might ultimately fall within § 2 to this Court in the first instance.

Second, when Congress repealed § 2282 in 1976[34] it specifically considered the question of the best means for policing the injunctive process in constitutional challenges pending decision on the underlying merits. Whereas review of three-

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continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

[33] Title 28 U.S.C. § 2284(3) derives in part from the portions of § 3 discussed above in text, and provides that a district judge may grant a temporary restraining order pending hearing and disposition of the underlying merits by a three-judge district court.

[34] See Pub. L. 94-381, § 2, 90 Stat. 1119.

judge interlocutory orders in such cases formerly had been routed directly to this Court, see §§ 2282, 2283 (1970 ed.), Congress believed that interlocutory review in the courts of appeals pursuant to §§ 1291 and 1292(a) would be most consistent with sound judicial administration.

> "One other concern of the committee was the review of the granting, or the denial, of a stay of an injunction by a district court. The committee believes that with appeals of these cases clearly vested in the 11 Circuit Courts of Appeal, they will be more able than the Supreme Court to carefully consider and evaluate requests for a stay in these cases and that ample procedures exist to act effectively in these cases. See, 3 *Barron and Holtzoff* (Wright ed.) § 1371-78." S. Rep. No. 94-204, p. 11 (1975).[35]

Congress thereby indicated its firm intention to leave monitoring of the equitable injunctive process to the courts of appeals in the first instance, and to reserve mandatory direct Supreme Court review for those cases in which this Court properly could resolve the underlying merits of the constitutional challenges themselves.[36]

II

Although deciding that a direct appeal of this preliminary injunction is proper, the six Members of today's majority appear to be sharply divided over the nature of the issues before us and the proper scope of our authority on review.

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[35] The reference is to 3 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 1371-1378 (1958), which discusses, *inter alia*, the standards for staying district court orders pending appeals.

[36] Because Congress repealed the three-judge district court requirement for cases such as this and "clearly vested" review of interlocutory matters in such cases in the courts of appeals, S. Rep. No. 94-204, p. 11 (1975), the Court's reliance on precedent respecting appeals of three-judge interlocutory orders obviously is misplaced. See *ante*, at 319, citing *Goldstein v. Cox*, 396 U.S. 471, 476 (1970).

JUSTICE O'CONNOR, joined by JUSTICE BLACKMUN, eschews any attempt to resolve the underlying merits of the constitutional challenge. She properly recognizes that, because "[t]he merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage," it would be improper to express any views on the merits of the appellees' as-applied challenges. *Ante*, at 338 (concurring opinion). Nor, properly, does JUSTICE O'CONNOR purport to determine the facial validity of the challenged statutes, given that the District Court has never reached a fully consummated determination on that question. Instead, she simply observes that "the record falls short of establishing any *likelihood* of such sweeping facial invalidity." *Ante*, at 337 (emphasis added). JUSTICE O'CONNOR accordingly limits her analysis to application of the abuse-of-discretion standard that governs review of preliminary-injunction orders, concluding that "the District Court abused its discretion in issuing a nationwide preliminary injunction." *Ante*, at 336. Although I find this approach far preferable to that taken by the opinion for the Court, I respectfully submit that it is inconsistent with § 1252 for two reasons: First, as set forth above, application of the abuse-of-discretion standard to the equitable process of granting preliminary relief is not subsumed in § 1252 and properly is left to the courts of appeals in the first instance. Second, this approach, by properly avoiding the ultimate resolution of the facial and as-applied constitutional challenges, has not in the slightest way furthered the underlying purpose of § 1252—ensuring the prompt and dispositive resolution of the merits of facial and as-applied constitutional challenges to federal statutes.[37]

The opinion for the Court appears to take a very different tack. To be sure, the Court notes two or three times that the District Court simply found a "likelihood" that the appellees

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[37] If I read the various opinions in this case correctly, it appears that a majority of the Court—JUSTICES O'CONNOR and BLACKMUN in their concurring opinion, and the three justices in dissent—has *not* determined that 38 U.S.C. §§ 3404 and 3405 are constitutional either facially or as applied to particular categories of claims.

after a full trial would be able to demonstrate the unconstitutionality of the challenged statutes, and it states once in passing that the District Court "abused its discretion" in so finding. *Ante*, at 312-313, 315, 334. But that is not the essence of the Court's approach. The Court repeatedly seeks to cast doubt on the bona fides of the District Court's entry of preliminary relief pursuant to Rule 65 by describing that relief in quotation marks: the District Court did not really grant a preliminary injunction, but a "preliminary injunction." *Ante*, at 308, 312, 316. Having thus suggested that the matter is one of "semantic[s]" making "little difference," *ante*, at 317, the Court proceeds to assert, repeatedly, that the District Court actually "*held* that [the $10] limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment," *ante*, at 307 (emphasis added).[38] Having thus mischaracterized the District Court's decision, the Court then purports "to decide this case on the merits," *ante*, at 312, n. 5—bootstrapping its way past the rule that we may "intimate no view as to the ultimate merits" in preliminary-injunction cases[39] by observing that, under § 1252, "it was the *constitutional question* that Congress wished this Court to decide," *ante*, at 318 (emphasis added).

Having thus paved the way for its consideration of the constitutional merits, the Court then proceeds to "review" the District Court's "holding" in light of the record evidence and the three-part *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test. The Court focuses on the *Mathews* factors of the risk of an erroneous decision through the current procedures and the probable value of additional safeguards. The Court rummages through the partially developed record and seizes upon scattered evidence introduced by the Government on the eve of the preliminary-injunction hearing—evidence that never has been tested in a trial on the merits—and pronounces that evidence "reliable" and compelling. See, *e.g.*, *ante*, at 331.[40]

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38 See also *ante*, at 312-313, 326, 334.

39 *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975).

40 See also *ante*, at 327-330, 330-331, n. 12.

Moreover, the Court excoriates the appellees and the District Court repeatedly for failing to muster sufficient evidence to support the "holding" of unconstitutionality: the appellees made "no such" sufficient presentation of evidence, introduced "nothing" to support the "holding," and "failed to make the very difficult factual showing" necessary to support the "holding" of unconstitutionality. *Ante*, at 326, 329, 330.[41] The conclusion is preordained: the statutes give the appellees "an opportunity under the present claims process" to "make a meaningful presentation" without an attorney's assistance, and the District Court's "holding" of unconstitutionality must therefore be reversed. *Ante*, at 335.

This brand of constitutional adjudication is extraordinary. Whereas JUSTICE O'CONNOR faithfully adheres to the limited role of appellate judges in reviewing preliminary injunctions and thereby departs from the purposes of § 1252, the opinion for the Court seizes upon the underlying purposes of § 1252 in order to evade the well-established rule prohibiting appellate courts from even purporting to "intimate ... view[s]" on the ultimate merits when reviewing preliminary injunctions granted on likelihood of success. *Doran v. Salem Inn, Inc.*, 422 U.S., at 934. If the opinion for the Court turns out to be more than an unfortunate aberration, it will threaten a fundamental transformation of the equitable process of granting preliminary relief in cases challenging the constitutionality of Government action.[42] Individual litigants seeking such relief on grounds of irreparable injury and a balancing of hardships will essentially be required to confront the Government with

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41 See also *ante*, at 314, and n. 6, 324, n. 11, 327-334.

42 The Court's jurisdictional reasoning would also appear to implicate the process of reviewing federal-court preliminary relief in cases challenging the constitutionality of state statutes and state-court preliminary relief in cases challenging the constitutionality of federal statutes. See 28 U.S.C. § 1254(2) (granting mandatory appeals jurisdiction to this Court where "a State statute [is] held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States"); § 1257(1) (granting mandatory appeals jurisdiction over final state-court judgments and decrees where "the decision is against [the] validity" of a federal treaty or statute).

both hands tied behind their backs: if they successfully obtain such relief, this Court will immediately intervene pursuant to § 1252 to review the "holding" of unconstitutionality, will make *de novo* findings that selected evidence is "reliable," will castigate the individuals for failing to adduce sufficient evidence to support the "merits" of the "holding," and will issue a ringing proclamation that the challenged statute is constitutional.

III

I believe that § 1252 should have been construed to permit a direct appeal to this Court only from a lower court decision that represents a fully consummated determination that an Act of Congress is unconstitutional so as to permit this Court properly to resolve the constitutional question on the merits. Unlike JUSTICE O'CONNOR, I do not believe that § 1252 requires this Court directly to police the injunctive process in constitutional challenges in the first instance. Unlike the opinion for the Court, I do not believe that § 1252 may be invoked in such cases to short-circuit the process of orderly and principled constitutional adjudication. Accordingly, I believe the Court should have vacated the judgment and remanded to the District Court for the entry of a fresh decree, so that the Government could take a proper appeal of the preliminary-injunction order to the Court of Appeals for the Ninth Circuit. See, *e.g.*, *United States v. Christian Echoes National Ministry*, 404 U.S. 561, 566 (1972) (*per curiam*). The Court having decided to the contrary and having reached the merits, I join JUSTICE STEVENS' dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court does not appreciate the value of individual liberty. It may well be true that in the vast majority of cases a veteran does not need to employ a lawyer, *ante*, at 329-330, and that the system of processing veterans benefit claims, by and large, functions fairly and effectively without the participation of retained counsel. *Ante*, at 327. Everyone agrees, however, that there are at least some complicated cases in which

the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency by helping to organize the relevant facts and to identify the controlling issues. *Ante*, at 328, 329. What is the reason for denying the veteran the right to counsel of his choice in such cases? The Court gives us two answers: First, the paternalistic interest in protecting the veteran from the consequences of his own improvidence, *ante*, at 323; and second, the bureaucratic interest in minimizing the cost of administering the benefit program. *Ante*, at 323-325. I agree that both interests are legitimate, but neither provides an adequate justification for the restraint on liberty imposed by the $10-fee limitation.

To explain my disagreement with the Court, I shall first add a few words about the history of the fee limitation, then identify the flaws in the Court's analysis, and finally explain why I believe § 3404(c) and § 3405 impose an unconstitutional restraint on individual liberty.

I

The first fee limitation—$5 per claim—was enacted in 1862.[1] That limitation was repealed two years later and re-

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[1] Sections 6 and 7 of the Act of July 14, 1862, which authorized a grant of pensions to certain military personnel, provided as follows:

"Sec. 6. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, five dollars. In cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons, for which such agents and attorneys shall not be entitled to any fees,) one dollar and fifty cents.

"Sec. 7. *And be it further enacted*, That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty,

placed by the $10-fee limitation, which has survived ever since.[2] The limitation was designed to protect the veteran from extortion or improvident bargains with unscrupulous lawyers.[3] Obviously, it was believed that the number of scoundrels practicing law was large enough to justify a legislative prohibition against charging excessive fees.

At the time the $10-fee limitation was enacted, Congress presumably considered that fee reasonable. The legal work involved in preparing a veteran's claim consisted of little more than filling out an appropriate form, and, in terms of the aver-

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or other allowance under this act, on the condition that he shall receive a per centum upon, or any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence." 12 Stat. 568.

2 On July 4, 1864, Congress repealed the sixth and seventh sections of the 1862 Act, and substituted the following sections which raised the maximum fee to $10:

"Sec. 12. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the pension office, under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the pension-office, with the requisite correspondence, ten dollars; which sum shall be received by such agent or attorney in full for all services in obtaining such pension, and shall not be demanded or received in whole or in part until such pension shall be obtained; and the sixth and seventh sections of an act entitled 'An act to grant pensions,' approved July fourteenth, eighteen hundred and sixty-two, are hereby repealed." 13 Stat. 389.

Section 13 of the 1864 Act reenacted the criminal penalties contained in § 7 of the 1862 Act. *Ibid.* See n. 1, *supra*.

3 See Cong. Globe, 37th Cong., 2d Sess., 2101, 3119 (1862); Cong. Globe, 41st Cong., 2d Sess., 1967, 4459 (1870). See also *Calhoun v. Massie*, 253 U.S. 170, 173 (1920).

age serviceman's base pay, a $10 fee then was roughly the equivalent of a $580 fee today.[4] At its inception, therefore, the fee limitation had neither the purpose nor the effect of precluding the employment of reputable counsel by veterans. Indeed, the statute then, as now, expressly contemplated that claims for veterans benefits could be processed by "agents or attorneys."[5]

The fact that the statute was aimed at unscrupulous attorneys is confirmed by the provision for criminal penalties. Instead of just making an agreement to pay a greater fee unenforceable—as an anticipatory pledge of an interest in future pension benefits is unenforceable—the Act contains a flat prohibition against the direct or indirect collection of a greater fee, and provides that an attorney who charges more than $10 may be imprisoned for up to two years at hard labor.[6] Thus, an unscrupulous moneylender or merchant who might try to take advantage of an improvident veteran might have difficulty collecting his bill, but the unscrupulous lawyer might go to jail.

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4 The base pay for all military personnel averaged $231 annually in 1865. U.S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part I, p. 175 (1975). By contrast, military base pay for all personnel averaged $13,400 in 1984. See U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, p. 345.

5 Today, of course, the procedures are more elaborate than they were in 1864, and the number of claims presenting complex issues of law or fact has greatly increased. It is no longer true that the attorney would seldom, if ever, be asked to do more than fill out a simple form.

6 Recently, we noted the effect of criminal sanctions on constitutional analysis:

"The restriction involved here is not merely an effort by the Government to regulate the use of its own property, such as was involved in *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981), or the dismissal of a speaker from Government employment, such as was involved in *Connick v. Myers*, 461 U.S. 138 (1983). It is a flat, across-the-board criminal sanction ..." *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985).

The language in § 3405, particularly the use of the words "directly or indirectly," apparently would apply to consultations between a veteran and a lawyer concerning a claim that is ultimately allowed, as well as to an appearance before the agency itself. In today's market, the reasonable fee for even the briefest conference would surely exceed $10. Thus, the law that was enacted in 1864 to protect veterans from unscrupulous lawyers—those who charge excessive fees—effectively denies today's veteran access to *all* lawyers who charge reasonable fees for their services.[7]

II

The Court's opinion blends its discussion of the paternalistic interest in protecting veterans from unscrupulous lawyers and the bureaucratic interest in minimizing the cost of administration in a way that implies that each interest reinforces the other. Actually the two interests are quite different and merit separate analysis.

In my opinion, the bureaucratic interest in minimizing the cost of administration is nothing but a red herring.[8] Congress has not prohibited lawyers from participating in the processing of claims for benefits and there is no reason why it

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[7] In its Report on S. 349 in the 97th Congress, the Veterans' Administration stated:

"It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA." S. Rep. No. 97-466, p. 102 (1982) (letter of Veterans' Administration's Acting Director to Hon. Alan K. Simpson, dated July 14, 1981).

[8] Section 401 of a bill approved unanimously by the Senate Committee on Veterans' Affairs would have removed the $10-fee limitation for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals. The Committee Report stated: "Enactment of the provisions in Section 401 are estimated to entail no cost." *Id.*, at 79.

should.[9] The complexity of the agency procedures can be regulated by limiting the number of hearings, the time for argument, the length of written submissions, and in other ways, but there is no reason to believe that the *agency's* cost of administration will be increased because a claimant is represented by counsel instead of appearing *pro se*.[10] The informality that the Court emphasizes is desirable because it no doubt enables many veterans, or their lay representatives, to handle their claims without the assistance of counsel. But there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services. I categorically reject any such assumption.

The fact that a lawyer's services are unnecessary in most cases, and might even be counterproductive in a few, does not justify a total prohibition on their participation in all pension claim proceedings. This fact is perhaps best illustrated by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a case in which we held that the State does not have a constitutional obligation to pro-

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9 The Court's entire discussion of the bureaucratic interest is based on the assumption that the removal of the fee limitation constitutes a "proposed additional procedure." See *ante*, at 327. It would be more accurate to state that the proposal would permit more qualified spokesmen to participate in the existing procedure.

10 The District Court unequivocally found that, apart from the paternalistic interest, the Government would not be harmed in the slightest by lifting the fee limitation. The District Court wrote:

"The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests." 589 F. Supp. 1302, 1323 (ND Cal. 1984).

See also n. 8, *supra*.

vide a parolee or probationer with counsel in every revocation proceeding. The informality of the proceeding makes counsel unnecessary in most cases, but we squarely held that in some cases a lawyer's presence was constitutionally required.[11] Although, surprisingly, the Court relies on *Gagnon* today, see *ante*, at 324-325, not a word in that opinion implies that a parolee or probationer could be denied the right to have retained counsel represent him. The case-by-case approach to the participation of counsel endorsed in *Gagnon*[12] is the approach that should apply to veterans claim proceedings. Lawyers may not be needed in most cases, but should be permitted in appropriate cases.[13] The interest in efficient administration plainly does not justify a total prohibition on representation by counsel. Nor can it justify a rule that indirectly ac-

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11 We stated:

"We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U.S., at 790.

12 As we expressly noted:

"The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases." *Id.*, at 789.

13 In *FEC v. National Conservative PAC*, 470 U.S., at 493, the Court noted that "allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." By analogy, allowing the presentation of views by a *pro se* claimant while forbidding the expenditure of more than $10 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

complishes that result by discouraging their participation in all cases.

The paternalistic interest in protecting the veteran from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients. Most appropriately, such a rule might require agency approval, or perhaps judicial review, of counsel fees. It might also establish a reasonable ceiling, subject to exceptions for especially complicated cases. In fact, I assume that the $10-fee limitation was justified by this interest when it was first enacted in 1864. But time has brought changes in the value of the dollar, in the character of the legal profession, in agency procedures, and in the ability of the veteran to proceed without the assistance of counsel.

In 1982, the Senate Committee on Veterans' Affairs reviewed the fee limitation and concluded:

> "As was discussed in the VA's agency report on S. 330 (VA report on S. 330 at pages 16-17 (reprinted at pages 98-99 of S. Rept. No. 96-178)), the basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality (see, e.g., *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd mem. sub nom, Gendron v. Levi*, 423 U.S. 802 (1975); *Staub v. Roudebush*, 574 F. 2d 637 (D.C. Cir. 1978)), *it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.*

"The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, *an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record."* S. Rep. No. 97-466, pp. 50-51 (1982) (emphasis added).

Moreover, the growth of the strong system of active service officers who provide excellent representation at no cost to claimants is significant because it has virtually eliminated the danger that a claimant will be tempted to waste money on unnecessary legal services. As the Senate Committee recognized, however, the availability of such competent, free representation is not a reason for denying a claimant the right to employ counsel of his own choice in an appropriate case.

III

It is evident from what I have written that I regard the fee limitation as unwise and an insult to the legal profession. It does not follow, however, that it is unconstitutional. The Court correctly notes that the presumption of constitutionality that attaches to every Act of Congress requires the challenger to bear the burden of demonstrating its invalidity. Before attempting to do so, I must comment on two aspects of the

Court's rhetoric: Its references to the age of the statute and to the repudiation of *Lochner v. New York*, 198 U.S. 45 (1905).

The fact that the $10-fee limitation has been on the books since 1864 does not, in my opinion, add any force at all to the presumption of validity. Surely the age of the *de jure* segregation at issue in *Brown v. Board of Education*, 347 U.S. 483 (1954), or the age of the gerrymandered voting districts at issue in *Baker v. Carr*, 369 U.S. 186 (1962), provided no legitimate support for those rules. In this case, the passage of time, instead of providing support for the fee limitation, has effectively eroded the one legitimate justification that formerly made the legislation rational. The age of the statute cuts against, not in favor of, its validity.

It is true that the statute that was incorrectly invalidated in *Lochner* provided protection for a group of workers, but that protection was a response to the assumed disparity in the bargaining power of employers and employees, and was justified by the interest in protecting the health and welfare of the protected group. It is rather misleading to imply that a rejection of the *Lochner* holding is an endorsement of rational paternalism as a legitimate legislative goal. See *ante*, at 323. But in any event, the kind of paternalism reflected in this statute as it operates today is irrational. It purports to protect the veteran who has little or no need for protection, and it actually denies him assistance in cases in which the help of his own lawyer may be of critical importance.[14]

But the statute is unconstitutional for a reason that is more fundamental than its apparent irrationality. What is at stake is

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[14] Justice Brandeis' statement in *Olmstead v. United States*, 277 U.S. 438 (1928), is worth remembering in this context:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479 (Brandeis, J., dissenting).

the right of an individual to consult an attorney of his choice in connection with a controversy with the Government. In my opinion that right is firmly protected by the Due Process Clause of the Fifth Amendment[15] and by the First Amendment.[16]

The Court recognizes that the Veterans' Administration's procedures must provide claimants with due process of law, but then concludes that the constitutional requirement is satisfied because the appellees have not proved that the "probability of error under the present system" is unacceptable.[17] *Ante*, at 326. In short, if 80 or 90 percent of the cases are correctly decided, why worry about those individuals whose claims have been erroneously rejected and who might have prevailed if they had been represented by counsel?

The fundamental error in the Court's analysis is its assumption that the individual's right to employ counsel of his choice in a contest with his sovereign is a kind of second-class interest that can be assigned a material value and balanced on

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15 Cf. *Wright v. Ingold*, 445 F. 2d 109, 111-112 (CA7 1971).

16 Some propositions are so obvious that they seldom need to be stated explicitly. In a series of cases the Court has considered the extent to which the First Amendment protects the lawyer's right to solicit business, finding protection in some situations but not others. Compare *In re Primus*, 436 U.S. 412, 423-426 (1978), with *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). But in all of those cases it was necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment. That assumption was explicitly acknowledged by the parties in the *Primus* case and recognized in a footnote to our opinion, 436 U.S., at 426, n. 17 ("There is no doubt that such activity is protected by the First Amendment"). If ordinary communication between attorney and client is so protected, it is doubly important to prevent abridgment of communication in support of an exercise of the right to petition the Government for the redress of a veteran's grievances. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

17 Indeed, at one point in its opinion the Court seems to take the position that there is no constitutional defect unless "the entire system is operated contrary to its governing regulations." *Ante*, at 324, n. 11.

a utilitarian scale of costs and benefits.[18] It is true that the veteran's right to benefits is a property right and that in fashioning the procedures for administering the benefit program, the Government may appropriately weigh the value of additional procedural safeguards against their pecuniary costs. It may, for example, properly decide not to provide free counsel to claimants. But we are not considering a procedural right that

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[18] As I explained in protesting the Court's denigration of the right to counsel in proceedings to terminate parental rights:

"The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 60 (1981) (dissenting).

Moreover, the Framers of the Constitution created a federal sovereign whose powers were to be exercised by different branches—a Legislature, an Executive, and a Judiciary—and which was expected to coexist with at least 13 other sovereigns having jurisdiction over the same people and the same territory. Surely, if they were motivated by a desire to improve the efficiency of the economy, they could have developed a much more simple design for the new Government. The reason they did not do so is perfectly clear. The text of the Constitution is replete with provisions that are intended to secure the blessings of liberty—or conversely, to protect against the dangers of tyranny—notwithstanding their possible costs. Significantly, those protections not only recognized the evils associated with a monarch, or an executive with absolute power, but also the risk of tyranny by an unrestrained majority. The limited delegations of power to the Federal Government, the tripartite division of authority among three branches of the Federal Government, the division of the Legislature into two Houses, the staggered terms of office, with Senators serving six years, the President four years, and Representatives only two, the provision for a Presidential veto of Acts of Congress, the guarantee of life tenure for federal judges—all of the checks and balances are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.

would involve any cost to the Government.[19] We are concerned with the individual's right to spend his own money to obtain the advice and assistance of independent counsel in advancing his claim against the Government.[20]

In all criminal proceedings, that right is expressly protected by the Sixth Amendment. As I have indicated, in civil disputes with the Government I believe that right is also protected by the Due Process Clause of the Fifth Amendment and by the First Amendment. If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society.[21] Even though a dispute with the sovereign may only involve

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[19] The way the Court utilizes the *Mathews v. Eldridge* procedural-due-process analysis is somewhat misleading. Here, appellees do not seek additional opportunities to be heard, to have counsel appointed at governmental expense, or any type of additional procedure. They simply want to exercise their right to choose, to consult, and to employ the services of legal counsel in order to conduct and manage their personal affairs—a right that should be unfettered in a free society.

[20] See *Munn v. Illinois*, 94 U.S. 113 (1877):

"No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. ... By the term 'liberty,' as used in the provision, something more is meant than the mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." *Id.*, at 142 (Field, J., dissenting).

[21] As Justice Jackson recognized in *American Communications Assn. v. Douds*, 339 U.S. 382, 442-443 (1950):

"The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."

property rights, or as in this case a statutory entitlement, the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.[22] Just as I disagree with the present Court's crabbed view of the concept of "liberty,"[23] so do I reject its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.[24]

In my view, regardless of the nature of the dispute between the sovereign and the citizen—whether it be a criminal trial, a proceeding to terminate parental rights, a claim for social security benefits, a dispute over welfare benefits, or a pension claim asserted by the widow of a soldier who was killed on the battlefield—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her

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22 The Solicitor General cavalierly states that "[n]othing in the First Amendment suggests that the fee limitation is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge." Brief for Appellants 47. This statement misses a principle so plain and fundamental that I would think it would not need to be stated: Every citizen in this country is presumed to be unrestricted in consulting or employing an attorney on any matter, or in making the decision that legal representation for any purpose is not needed. As to this proposition, it makes no difference whether, as the Solicitor General claims, "the existing VA claims procedure is fair and adequate without privately retained attorneys," *ibid.*, a conclusion that the District Court rejected. The statute, moreover, on the one hand, recognizes and allows legal representation, but on the other hand restricts the veteran's right to choose and to consult a legal representative in any meaningful manner, thus virtually reducing the right to counsel to nonexistence.

23 Compare *Meachum v. Fano*, 427 U.S. 215, 225-226 (1976), with *id.*, at 230 (STEVENS, J., dissenting).

24 That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood. Dick's statement ("The first thing we do, let's kill all the lawyers") was spoken by a rebel, not a friend of liberty. See W. Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.

behalf is an aspect of liberty that is priceless. It should not be bargained away on the notion that a totalitarian appraisal of the mass of claims processed by the Veterans' Administration does not identify an especially high probability of error.[25]

Unfortunately, the reason for the Court's mistake today is all too obvious. It does not appreciate the value of individual liberty.

I respectfully dissent.

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[25] According to the Court, "process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Ante*, at 330.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; Swords to Plowshares Veterans Rights Organization, a California non-profit corporation; Don E. Cordray, an individual; Albert R. Maxwell, an individual; Reason F. Warehime, an individual; Doris J. Wilson, an individual, Plaintiffs.

v.

Harry N. WALTERS, Administrator of The Veterans Administration; the United States of America; the Veterans Administration; Paul D. Ising, Director, San Francisco Regional Office, the Veterans Administration, Defendants.

NO. C–83–1861–MHP.

United States District Court,

N.D. California

May 7, 1986.

James T. Garrett, Gordon P. Erspamer, Michael F. Ram, Morrison & Foerster, San Francisco, Cal., for plaintiffs.

George Christopher Stoll, Asst. U.S. Atty., San Francisco, Cal., Edward J. Luke, Deputy Asst. Gen. Counsel, Veterans Dept., Washington, D.C., Jack Nagan, Office of Dist. Counsel, Veterans Admin., San Francisco, Cal., for defendants.

PATEL, District Judge.

This action is before the court on plaintiffs' motion for class certification. For the reasons discussed below, the court concludes that plaintiffs have made a sufficient showing to justify conditional certification of the proposed class.

PROCEDURAL HISTORY

This action was originally filed by two veterans' organizations and four individuals challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405, which impose a $10.00 fee limit for all work performed by an attorney in representing a veteran pursuing Service-Connected Death and Disability ("SCDD")

claims before the Veterans Administration ("VA"). Plaintiffs alleged that the fee limitation effectively precluded them from obtaining counsel, thereby depriving them of their right to procedural due process under the Fifth Amendment and their First Amendment rights to petition the government for redress of grievances and to associate freely. Plaintiffs challenged the fee limitation both "on its face" and "as applied" to them.

On June 12, 1984, this court granted plaintiffs' motion for a preliminary injunction, finding that plaintiffs had demonstrated a high likelihood that they would prevail on both their due process and First Amendment claims, and that they would suffer irreparable injury if the injunction was not granted. *National Association of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (N.D.Cal. 1984).

On June 28, 1985 the Supreme Court, in four separate opinions, reversed this court's preliminary injunction order. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). A majority of the Court held that the fee limitation was not unconstitutional on its face and that a nationwide injunction granting "categorical relief" was therefor inappropriate. Justice O'Connor, in a concurring opinion, made clear her understanding that the Court was not determining the merits of plaintiffs' "as applied" claims and that "the claims of any individuals or identifiable groups . . . remain open on remand." 105 S.Ct. at 3197. With respect to the claims of any "identifiable groups," Justice O'Connor suggested that plaintiffs could prevail if they could demonstrate the existence of a "subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans '"[a] hearing appropriate to the nature of the case."'" 105 S.Ct. at 3198 (citations omitted). Justice O'Connor noted, however, that plaintiffs' claims had not been framed as a class action and that this court's findings and relief were not narrowly drawn to reach only a discrete class of complex cases. Thus, Justice O'Connor concluded, "[i]n its present posture, this case affords no sound basis for carving out" a subclass of complex

cases with respect to which application of the fee limitation might be unconstitutional. *Id.*

Following the Supreme Court's decision, plaintiffs amended their First Amended complaint to add a class claim on behalf of all "Ionizing Radiation Claimants." Defendants moved to dismiss plaintiffs' Second Amended Complaint, arguing that the Supreme Court had rejected plaintiffs' constitutional claims on their merits. On June 22, 1986, this court granted defendants' motion with respect to plaintiffs' facial challenge, but denied the motion with respect to the "as applied" claims.

Plaintiffs now move for certification of the following class:

> All persons who currently have pending or who file or re-open VA service-connected death and disability compensation 1 ("SCCD") claims based on exposure to nuclear radiation from government atomic bomb tests in the Marshall Islands or the Nevada Test Site or from the atomic bombs dropped on Hiroshima and Nagasaki in 1945 ("Ionizing Radiation Claims"). The class also includes all persons who are receiving or receive SCDD for an Ionizing Radiation Claim but: (1) whose compensation has been reduced or is threatened with reduction, or (2) who have formally contested, or formally contest, the disability rating issued by the VA or the period of retroactive compensation.

(Plaintiffs' Reply at 14-15). In short, the proposed class consists of all past, present and future ionizing radiation claimants who have, or will have, some form of "active" claim relating to SCDD benefits before the VA.

Defendants oppose class certification, contending that plaintiffs' proposed class fails to meet any of the requirements of Rule 23 and is inconsistent with the Supreme Court's decision in this case.

DISCUSSION

Requirements of Rule 23(a)

All motions for class certification must meet the requirements of Rule 23(a), which provides that a class action may be maintained if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

Although mere speculation as to the number of class members is not sufficient to satisfy Rule 23(a)(1), *see* 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1762 (1985), "the exact size of the class need not be known so long as 'general knowledge and common sense indicate that it is large.'" *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D.Cal. 1984) (quoting *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D.Cal. 1982). The outer limits of the class size in this case are relatively certain. According to defendants' figures, approximately 233,000 veterans participated in the government's atomic bomb tests and the occupation of Hiroshima and Nagasaki. thus, the class size is somewhere between 233,000 and 6—the number of named plaintiffs in this action. Although it is impossible to tell precisely where the actual class size falls on this continuum, there is ample reason to believe that it is sufficiently large to meet the requirements of Rule 23(a)(1).

The proposed class in this case includes those ionizing radiation claimants who seek to reopen claims already denied, those with claims currently pending and those who may file claims at some future date, as well as some veterans who are receiving benefits but who believe they are not receiving all the benefits to which they are entitled. 3,875 ionizing radiation

claims have already been decided by the VA and all but 16 of them have been denied. Thus, there are presently 3,859 veterans who may seek to reopen their claims if permitted to retain an attorney for that purpose. If only 1% of these claimants actually seek to reopen their claims, the class would be sufficiently large, without considering pending and future claims. Significantly, pursuant to a settlement agreement reached *Gott v. Walters*, Nos. 82–1148, 82–1159, 82–1454 (D.C.Cir.), an action challenging the VA's ionizing radiation regulations, many of these claimants will soon be personally notified by the VA of their right to seek a reopening of previously denied claims and the procedures they must follow.

Although the precise number of pending claims is not know, defendants conceded at oral argument that the number is substantial. Moreover, as defendants also conceded, they have at their disposal the information necessary to determine the number of pending claims but, to date, have made no attempt to do so. Under these circumstances, defendants can hardly complain that plaintiffs have failed to establish the number of pending claims. *See, e.g., Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980) (rejecting as "pure sophistry" the government's contention that class certification must be denied because plaintiff was unable to state the exact number of persons affected by the challenged practice, noting that the government had the means to identify the affected individuals at will). Furthermore, if in fact neither party can count, let alone identify, those individuals with pending claims, this alone suggests joinder would be impracticable. *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982).

Finally, although there is, of course, no way to determine the number of future claimants, several factors suggest that the number will be quite large. These factors include the recent surge in awareness and political and legal activity in the area of "atomic veterans," the long latency period of many radiation-related diseases, and the fact that there are over 200,000

potential claimants, thousands of whom have already filed claims.

In short, although the precise number of class members is not know, "general knowledge and common sense indicate" that the class is large enough to make joinder impracticable.[1] The court need not rely on class size alone, however. Although the requirement of 23(a)(1) is often referred to as the "numerosity requirement," the true focus of 23(a)(1) is the impracticability of joinder. Thus, in determining whether joinder is impracticable in a particular case, the court should consider not only the class size but other factors as well, including the geographical diversity of class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought. *See, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); 1 H. Newburg, *Class Actions* § 3.06 (2d ed. 1985); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1762 (1972).

At defendants' suggestion, plaintiffs included all future ionizing claimants in the proposed class. "[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals in impracticable and the numerosity requirement is therefore met," regardless of class size. *International Molders' and Allied Workers' Local Union No. 164 v.*

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[1] *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D.Cal.1976), *app. dismissed*, 602 F.2d 925 (9thCir.1979), relied on by defendants, is distinguishable. The plaintiffs in *Nguyen Da Yen* were "able to say only that at least a few of the children here as a result of the Vietnamese orphan airlift are similarly situated to the named representatives." *Id.* at 662. The court found no basis on which to estimate the number of class members or even to determine whether the class included more than ten members. As already discussed, based on the figures that *are* available to the court in this case and the nature of both the class composition and the underlying claims, there is good reason to believe that the proposed class is sufficiently large to make joinder impracticable, even though the precise size of the class is unknown. Moreover, as will be discussed below, joinder is impracticable in this case for a number of other reasons which were either not applicable or were not considered by the court in *Nguyen Da Yen*.

Nelson, 102 F.R.D. 457, 461 (N.D.Cal. 1983) (citing *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974)). *See also Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D.Cal. 1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured"); *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 391, 396 (N.D.Cal. 1975) ("Since there is no way now of determining how many of these future plaintiffs there may be, their joinder is impracticable").

The nature of the action and the relief sought also support a finding that the requirements of Rule 23(a)(1) have been met. Plaintiffs challenge the fee limitation on constitutional grounds and seek both injunctive and declaratory relief. As one commentator has noted, "class actions challenging statutes or administrative procedures on constitutional grounds, have been recognized as natural class actions, and inclusion in the class of potentially aggrieved individuals has often been regarded as sufficient to meet the Rule 23(a)(1) impracticability requirement." 1 H. Newburg, *Class Actions* § 3.07 (2d ed. 1985). *See also Smith v. Heckler*, 595 F. Supp. at 1186 ("[S]pecial consideration applies to actions seeking declaratory or injunctive relief against conduct that is likely to cause future harm").

Geographical diversity is another relevant consideration. This is a nationwide class action brought on behalf of all ionizing radiation claimants. Because, by definition, all such claimants were serving in the military at the time of their alleged exposure to nuclear radiation, it is reasonable to assume that they are spread out across the United States, thus making joinder less practicable.

Finally, the court notes that many, if not most, of the claimants may well be unable to bring individual suits. The class members are all disabled veterans or their widows. It is unlikely that many of these claimants have the financial resources to mount an individual constitutional challenge to the fee limitation.

Taken together, these factors support a finding that joinder would be impracticable, regardless of the class size. When

considered in conjunction with those factors which suggest the class is, in fact, quite large, it is clear that the requirements of Rule 23(a)(1) have been met.[2]

2. Commonality

In order to meet the commonality requirement of 23(a)(2), plaintiffs must establish that there are questions of law *or* fact common to the class as a whole. Rule 23(a)(2) does not require that all members of the class be identically situated; the requirement is met so long as there are substantial questions of law or fact common to all. *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 914 (9th Cir. 1964).

There can be no doubt that there exists a substantial question of law common to all class members: whether the fee limitation, as applied to ionizing radiation claimants, violates the due process clause and the First Amendment by precluding them from retaining counsel in connection with their SCDD claims. In *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), the plaintiffs brought a class action on behalf of indigent parents who were parties to dependency proceedings alleging that they had a constitutional right to appointed counsel in such proceedings. The Ninth Circuit upheld the district court's finding that the requirements of Rule 23(a)(2) had been met, stating: "The principal question of law is common to all members. All assert a constitutional right to appointed counsel." *Id.* at 943. Here, the class members all assert a constitutional right to retain counsel.

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[2]Defendants contend that there is one subclass—those persons receiving SCDD benefits for ionizing radiation who are either being threatened with reduction or are contesting their disability rating—which clearly fails to meet the numerosity requirement because only 16 such claims have been allowed. Even assuming that these claimants are properly characterized as a "subclass," and that joinder of all 16 would not be impracticable, the proposed class includes not only those who are currently receiving benefits for ionizing radiation but also those who, in the future, receive such benefits. Thus, the class is not limited to 16 members and includes future claimants whose inclusion makes joinder inherently impracticable (see discussion, *infra*).

In addition to this fundamental common issue of law, plaintiffs identify the following common issues of fact:

> (1) the factual complexity of the underlying Ionizing Radiation Claims; (2) the VA's lack of resources to develop or refusal to develop the facts necessary to reestablish Ionizing Radiation Claims; (3) the legal complexity of the VA's ionizing radiation regulations and the considerable judgment involved in applying the law to the facts; (4) the radiogenic nature of the diseases and the lengthy latency periods associated with such diseases; (5) the difficulty of locating and obtaining complete medical records for the claimant's period of service; (6) the almost universal need for expert testimony; (7) the need to refute Defense Nuclear Agency dose reconstructions with testimony from qualified health experts; (8) the inability of service representatives to adequately represent Ionizing Radiation Claimants and claimants' dissatisfaction with the services performed by service representatives; (9) the difficulty of placing veterans at exposure sites due to inadequate DOD record-keeping; (10) obstacles placed by DOD/DNA to make the claims process more difficult, such as the necessity of submitting a FOIA request to obtain a government dose reconstruction; and (11) the existence of physical disabilities that prevent claimants from prosecuting their claims.

(Plaintiffs' Brief at 8-9).

All of these issues relate to the ultimate issue, at the heart of plaintiff's constitutional challenge, whether ionizing radiation claims are, by their very nature, so complex that the assistance of an attorney is necessary to ensure a fair and constitutionally adequate hearing. As such, these factual issues are clearly common to all ionizing radiation claimants, regardless of any variations in the facts or circumstances of each claimant's individual claim *for benefits*. Defendants might ultimately prevail on their argument that ionizing radiation claims are not so inherently complex as to require the assistance of counsel in every case. But this argument goes to the

very merits of plaintiff's constitutional claim—not to the issue of commonality or the propriety of certifying a class action. The cases cited by defendants are clearly distinguishable. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), involved a challenge to the conditions in all county jails in all 82 counties in the state. The Fifth Circuit simply upheld the district court's finding that "'the physical and environmental conditions at county jails in the state are so divergent that it is virtually impossible to state with certainty what may be common issues,'" adding that although Rule 23(a)(2) does not require complete identity of legal claims, "it does require that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Id.* at 335. Here, plaintiffs have identified a host of legal and factual issues whose resolution will affect the putative class members.

In *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984), the plaintiffs challenged the state's use of the SSAT-I to create a pool of students "at risk" of not receiving a high school diploma. The Eleventh Circuit held that the district court properly denied certification because the determination of whether a student who failed the test would ultimately be eligible for a diploma was made by individual teachers on the basis of a student's individual achievements and unique situation. Similarly, in *Metcalf v. Edelman*, 64 F.R.D. 407 (N.D. Ill. 1974), the court found no common questions of fact among putative class members challenging the denial of shelter exceptions "since varying circumstances surround the denial of the individual shelter exceptions." *Id.* at 410. In contrast, all ionizing radiation claimants are denied the "right" to retain counsel regardless of their individual circumstances.

Finally, *Cleaver v. Wilcox* actually supports plaintiff's position, not defendants'. The Ninth Circuit in *Cleaver* held that the requirements of Rule 23 had been met and that a class action was therefore appropriate, even though *on the merits* the court held that an indigent parent's right to appointed counsel in a dependency hearing should be decided on a case-by-case basis. The Ninth Circuit's opinion in *Cleaver* serves to highlight defendants' confusion between what plaintiffs must establish

to prevail on the merits of their constitutional challenge and the showing they must make to meet the requirements of Rule 23.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiffs be typical of the claims of the class. The named plaintiffs in this case are two veterans and four veterans' widows. Both veterans allege that they were exposed to ionizing radiation while in the service and that they are currently suffering from disabilities as a result of this exposure. The four widows allege that their husbands died as a result of exposure to ionizing radiation while in the service. All six plaintiffs have filed SCDD claims which have been denied on the grounds that the injury or death was not caused by service-connected exposure to radiation.[3] All allege that they desired the assistance of counsel and sought to retain counsel but were prevented from doing so by the $10 fee limitation.

The claims of the named plaintiffs are thus typical of the claims of class members who, by definition, are individuals with SCDD claims based on alleged exposure to nuclear radiation while in the service and who are precluded by the $10 fee limitation from hiring an attorney. It is true that the specific facts and circumstances surrounding each of the named plaintiffs' *underlying claim for benefits* differs to some extent from the underlying claims of the other named plaintiffs and other class members. But this is not an action for benefits—it is an action challenging the constitutionality of the fee limitation as applied to all ionizing radiation claimants. With respect to this challenge, the claims of the named plaintiffs are clearly typical of the claims of the class members.

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[3]Although plaintiff Reason Warehime has a service-connected disability rating of 60%, his rating is based on conditions unrelated to radiation exposure and he has been denied service-connection with respect to the alleged effects of his exposure to radiation. Similarly, plaintiff Albert Maxwell currently has a 100% service-connected disability rating but was denied service-connection for his multiple myelomas which he contends were caused by his exposure to radiation.

Nevertheless, defendants contend that none of the named plaintiffs raise claims typical of the class claims. With respect to plaintiff Marthann Connor, defendants note that although her claim was originally denied, on March 25, 1986 the VA awarded Connor the benefits she sought. Therefore, defendants argue, her claim is not typical and she lacks standing to bring this action. Even assuming that the timing of the VA's change of position (two and one-half years after the initial claim was brought and only six days before defendants filed their opposition to class certification) was purely coincidental, Connor contests her period of retroactivity and thus is both a member of the class and continues to have an economic interest in this action.

With respect to the other five named plaintiffs, defendants contend their claims are not typical because, in each instance, the veteran either was not exposed to radiation while in the service or did not die or become disabled as a result of such exposure. Since the six veterans were not injured as a result of exposure to radiation while in the service, defendants argue, their claims are not typical of the claims of class members who *did* suffer injury or death from service-connected radiation exposure.

Defendants' argument is nothing more than blatant bootstrapping. In essence, defendants argue that the named plaintiffs' claims are not "typical" because the plaintiffs failed to prevail on their claim for benefits before the VA. But, of course, the whole point of this litigation is that plaintiffs contend they need the assistance of counsel in order to adequately prove their claims. The fact that the VA concluded they were not disabled as a result of service-connected radiation exposure neither establishes, for purposes of this litigation, that they in fact suffered no such injury nor renders their claims atypical.

Furthermore, under defendants' argument, none could ever have claims typical of the class, even if all the claims of all class members were identical: if a claimant like Connor prevails on her claim for benefits, defendants contend her claim is not typical and she lacks standing to sue; if, on the other hand,

the claimant fails to prevail this, defendants argue, similarly renders the claim atypical. Thus defendants present plaintiffs with the proverbial "Catch-22." It won't work. Moreover, defendants' argument ignores the fact that it is the legal and factual claims raised in *this litigation*, not in the plaintiffs' underlying claims for benefits, that must be "typical."

If defendants' argument was only lacking in cogency that would be one matter; however, in at least one respect, it lacks honesty as well. In their opposition brief, defendants assert that Stanley Wilson's death "was caused by his long-term alcoholism." The declaration of Robert Warner, a staff attorney for the VA, states that although Wilson's death certificate lists "'Malnutrition, probable infection' as the immediate cause of death . . . Wilson was a chronic alcoholic," the implication clearly being that Wilson's death was caused by his alcoholism. It is true that Wilson's death certificate lists "Malnutrition, probable infection" as the immediate cause of death. However, the very next line of the death certificate states that Wilson's malnutrition, and thus his death, was due to "Metastatic carcinoma." In fact, it appears that Wilson suffered, and died, from pancreatic cancer—one of the "radiogenic diseases" expressly recognized by the VA. 50 Fed.Reg. 34,459 (1985). There is no mention of alcoholism in Wilson's death certificate, let alone any suggestion that this was the cause of his death. Defendant's unsupported assertion to the contrary, and Mr. Warner's partial and obviously misleading quotation from the death certificate, are wholly inexcusable. Although plaintiffs have not expressly requested sanctions, this is one of those cases that cries out for the application of Rule 11. Mr. Warner's declaration will be struck in its entirety. Although this may not have any significant impact on the motion itself, it is intended to send a strong message to the responsible individuals in Washington[4] that this kind of conduct will not be tolerated. In addition, the court notes that

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[4]The court is satisfied that defense counsel who appeared at oral argument was neither aware of nor directly responsible for the offending misrepresentations.

it will treat any future submissions by Mr. Warner with due skepticism.

4. Adequacy of Representation

There are two aspects to the requirement of Rule 23(a)(4) that the representative plaintiffs will fairly and adequately protect the interests of the class: (1) the class representatives' attorneys must be qualified and experienced, and (2) the suit must not be collusive and the interests of the representative plaintiffs must not be antagonistic to those of the remainder of the class. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 42 (N.D. Cal. 1977) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968)).

Defendants do not contest the experience and competence of plaintiffs' counsel, and there is no suggestion that this action is in any way collusive. Defendants contend, however, that the interests of the named plaintiffs are antagonistic to the interests of many putative class members because: (1) there *may* be claimants who do not wish to hire an attorney but who, if plaintiffs prevail, *may* feel forced to do so based on the belief that claimants without an attorney will be treated as "second-class" claimants; (2) there *may* be claimants who believe the current non-adversarial system is preferable to an attorney-based adjudication system and who, if plaintiffs prevail, *may* lose the benefit of the current non-adversarial system; and (3) if plaintiffs do *not* prevail, individuals with "truly complex" cases would be foreclosed from retaining counsel. There is no merit to these contentions.

These arguments are illogical in view of defendants' position throughout this litigation, namely, that the VA and service organizations are able and willing to assist applicants with their claims no matter how simple or complex. They offer no factual basis for their arguments.

Of course, plaintiffs do not seek to "force" anyone to hire an attorney. Their position is that any radiation claimant who

wishes to hire an attorney has a constitutional right to do so.[5] Even if plaintiffs ultimately prevail, it is highly unlikely that the purported benefits of the current "non-adversarial" system would be lost. As Justice Rehnquist noted, ionizing radiation claims and "agent orange claims" (which are not at issue in this action) *together* compromise only about .3% of all SCDD claims. There is no reason to believe that permitting attorneys to represent claimants in this small fraction of cases would so transform the entire veterans' claims system so as to eliminate the benefits of what would remain almost entirely a non-adversarial system.

Finally, defendants appear to argue that although ionizing radiation claims are not, as a class, inherently complex, there are some "truly complex" claims for which applicants should be entitled to retain counsel. This is curiously at odds with their earlier position in this case. In any event, whatever the ultimate resolution, there is no reason to believe, as defendants suggest, that any claimant will be precluded from establishing the complexity of his or her claim on a case-by-case basis. For instance, in *Cleaver v. Wilcox*, the Ninth Circuit held that indigent parents were not, as a class, entitled to appointed counsel in dependency hearings yet had no trouble holding that class members nonetheless would have the opportunity to establish their right to counsel on a case-by-case basis. 499 F.2d at 945-46.

In short, the court finds no reason to believe that the interests of the named plaintiffs are antagonistic to those of other class members or that the named plaintiffs will, in any other

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[5]For this reason, the cases cited by defendants are clearly inapposite. In each case, the plaintiffs sought to compel certain action which some class members might wish to prevent, e.g. *Nguyen Da Yen*, 70 F.R.D. 656 (unification of Vietnamese children with their biological parents in Vietnam), or to prevent certain action which some class members might not want prevented, e.g. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (breach of racially restrictive covenant); *Phillips v. Klassen*, 502 F.2d 362 (D.C.Cir. 1974), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974) (offer of early retirement).

respect, fail to fairly and adequately represent the interests of the class.

Requirements of Rule 23(b)

In addition to meeting all of the requirements of Rule 23(a), the class must meet at least one of the requirements of 23(b). This action clearly meets the requirements of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. ..." Defendants have, without exception, precluded all ionizing radiation claimants from retaining counsel to represent them in connection with their SCDD claims. If plaintiffs can ultimately establish that ionizing radiation claims are, by their very nature, so complex that counsel is required to ensure a constitutionally adequate hearing, injunctive and declaratory relief will clearly be appropriate. If, on the other hand, the court ultimately holds that ionizing radiation claims are not inherently complex but that claimants must be given the opportunity to establish the complexity of their claim on a case-by-case basis, "a statement of due-process principles in the form of a declaratory judgment" to this effect would still be appropriate. *Cleaver*, 499 F.2d at 945.[6]

In addition, the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1)(A). Even assuming that all courts would interpret the Supreme Court's decision in this case as requiring that veterans be permitted to retain counsel in cases of sufficient complexity, courts will undoubtedly have different and often in-

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[6]Of course, if the court were to hold that ionizing radiation claimants have no right to retain counsel no matter how complex their individual claim—a position which even defendants do not assert—a declaratory judgment on a class-wide basis would clearly be appropriate.

consistent views concerning, *inter alia*, what guidelines and standards to apply in determining whether a specific claim is "sufficiently" complex, whether a claimant is entitled to a *judicial* determination of complexity in every case, and whether the burden of establishing complexity should shift or change depending on whether the underlying claim is of a type that is inherently complex. Separate adjudication of these and other related issues is likely to lead to the establishment of incompatible standards of conduct for defendants regarding the application of the fee limitation.

Class Definition

Defendants contend that the proposed class, as currently defined, can not be squared with the Supreme Court's decision in this case. Defendants place particular emphasis on Justice O'Connor's statement that, "In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans '"[a] hearing appropriate to the nature of the case."'" 105 S.Ct. at 3198 (citations omitted). Defendants contend that, "[i]n view of plaintiffs' failure to adduce any creditable evidence since the Supreme Court's decision," there is still no sound basis for carving out a subclass of "complex cases," let alone the one proposed by plaintiffs.

Defendants misconstrue Justice O'Connor's comment. First, it appears that Justice O'Connor's reference to the "present posture" of the case may not have been a reference to the state of the evidentiary record at all. By "present posture," Justice O'Connor may well have been referring to the fact, which she had noted in the preceding sentence, that plaintiffs' claims were "not framed as a class action nor were the lower court's findings and relief narrowly drawn to reach some discrete class of complex cases." *Id.* at 3198. Thus, Justice O'Connor may have meant only that, in light of plaintiff's failure to provide a "definition or quantification of 'complex cases'" by identifying and seeking relief on behalf of a particular class, and the district court's failure to provide such a definition or quantification by way of narrowly drawn findings,

there was no sound basis for the Supreme Court *itself* to carve out such a group. Rather, this is a task properly left to the plaintiffs in the first instance and, ultimately, to the district court. Indeed, Justice O'Connor expressly held that the issue remained open on remand and should be considered by this court. *Id.*

Even assuming, however, that Justice O'Connor's comment related to the state of the evidence, it does not follow that plaintiffs' failure to present any substantial additional evidence since the Supreme Court's decision precludes certification of the proposed class.[7] It is clear from Justice O'Connor's opinion that she believed the fee limitation would be unconstitutional as applied to a discrete group of claims which, by their very nature, are so complex that the assistance of an attorney is necessary to ensure a fair and adequate hearing. In other words, if plaintiffs could establish the existence of such a group, they would be entitled to prevail *on the merits*. To require plaintiffs to establish that the proposed class *is* such a group in order to obtain class certification, as defendants urge, would be to require plaintiffs to prove their case on the merits as a pre-requisite for bringing a class action—a position which defendants themselves recognize as untenable. (Defs' Opp. at 14).

Defendants also rely on Justice Rehnquist's statement that at least 30% of all ionizing radiation claims are disposed of because the medical examinations reveals no disability and that such claims, therefore, can not be considered complex "by any fair definition of that term." 105 S.Ct. at 3194. Thus, defendants argue, at least 30% of the proposed class is made up of class members whose claims are not "complex" and who, therefore, are clearly not entitled to retain counsel.

This comment is based solely on the record available at the time of the preliminary injunction. The Justice goes on to con-

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[7]Of course, Justice O'Connor's comment was not in reference to the propriety of class certification; plaintiffs had not yet amended the complaint to add a class claim, let alone proposed a specific class.

clude that not all such claims would be complex. However, implicit in his observation is the lack of a basis for determining the number of complex cases. At the trial on the merits the court will have to make this determination and take into account the realities of the claims adjudication process. For example, a veteran seeking SCDD benefits must present the VA with all supporting evidence and documentation at the time he or she files the claim for benefits. The VA then considers all this evidence, along with the report of the examining VA doctor, to determine whether and to what extent the claimant is entitled to benefits. Thus, at the time the claimant must develop and present the evidence to support his claim—tasks which plaintiffs contend requires the assistance of counsel—there is no way of knowing on what grounds the VA might ultimately decide the claim. In light of the nature of the claims process, the court concludes that for purposes of determining a claimant's right to counsel, the complexity of the claim must be judged in terms of the nature and extent of the showing the claimant will have to make in submitting his claim to the VA—not on some retroactive assessment of whether the VA's ultimate decision is a complex one. In other words, it is the nature of the *claim* presented to the VA, not the nature of the VA's ultimate *decision*, that determines "complexity" for purposes of a claimant's right to counsel. Under this view, the fact that the claims of some putative class members might ultimately be denied on the grounds that they suffered no disability, does not render their inclusion in the proposed class inappropriate.

In addition, plaintiffs may be able to establish that, because of the nature of radiation-related diseases, establishing the existence of a medical disability in ionizing radiation claims is, to a constitutionally significant degree, more complex than establishing disability in other cases. Although the current record would not support such a finding, plaintiffs should be given a reasonable opportunity to present evidence on this issue.

CONCLUSION

The court finds that the requirements of Rule 23 have been met and that the proposed class may be conditionally certified as currently defined, subject to modification should the court determine that such modification is warranted either by the evidence or applicable law.

IT IS SO ORDERED.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., Plaintiffs, v. Edward J. DERWINSKI, Secretary of Veterans Affairs, et al., Defendants.

No. C-83-1861-MHP.

United States District Court, N.D. California. Jan. 29, 1992.

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Charles Horsky, Covington & Burling, Washington, D.C., Special Master.

Robert L. Gnaizda, Public Advocates, Inc., San Francisco, Cal., for American G.I. Forum.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PATEL, District Judge.

Plaintiffs have brought this action to challenge the constitutionality of 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905), which limit the fee a veteran or veteran's survivor may pay to an attorney to assist him or her in prosecuting a claim before the Veterans Administration ("VA") to $10.00, and which impose criminal penalties on attorneys who accept fees in excess of the $10.00 limit. By order of June 12, 1984, this court granted plaintiffs'

motion for a preliminary injunction prohibiting the enforcement of the $10.00 fee limit. *National Ass'n of Radiation Survivors v. Walters,* 589 F.Supp. 1302 (N.D.Cal.1984) ["NARS 1"]. The Supreme Court reversed, holding that the fee limit was not unconstitutional on its face. *Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) ["NARS II"]. However, the Court's opinion left open the possibility that, on remand, plaintiffs would be able to show that the fee limit was unconstitutional as applied to particular classes of complex claims. *See NARS II,* 473 U.S. at 337-38, 105 S.Ct. at 3197-98 (O'Connor, J., concurring).

On remand, plaintiffs amended their complaint to challenge the constitutionality of the fee limit as applied to claimants with service-connected disability or death ("SCDD") compensation claims based on exposure to ionizing radiation. This court granted plaintiffs' motion for certification of a class consisting of "all past, present and future ionizing radiation claimants who have, or will have, some form of `active' claim relating to SCDD benefits before the VA." *National Assn of Radiation Survivors v. Walters,* 111 F.R.D. 595, 598 (N.D.Cal. 1986) ["NARS III"]. After extensive pretrial proceedings, the matter was tried to the court over a period of nearly two months. The trial included testimony by numerous expert witnesses regarding the medical, scientific and legal complexities characteristic of ionizing radiation claims.

During and after the trial Congress worked to change the manner in which veterans' claims were adjudicated and reviewed. After adoption of the Veterans' Judicial Review Act of 1988, Pub.L. No. 100-687, 102 Stat. 4105 (1988), the parties went to great lengths to settle this action in light of the new legisla-

tion.[1] Ultimately, the efforts to settle were unsuccessful and the parties returned to this court for a decision on the merits based upon the trial record and other post-trial submissions.

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[1]The Veterans' Judicial Review Act of 1988 ("JRA") was signed into law on November 18, 1988. The JRA amended the fee limitation challenged by plaintiffs in this case by providing that a fee may be paid for attorney services rendered after the date of the first date on which the Board of Veterans Appeals renders a final decision in a case and by creating the United States Court of Veterans Appeals to provide judicial review for BVA decisions.

The fee provisions of the JRA, however, apply only to cases in which a Notice of Disagreement was filed with the VA on or after the Act's date of enactment. Thus, the fee limitation challenged in this case still applies to those members of the class who are past or current claimants and filed a Notice of Disagreement prior to November 18, 1988.

The court declined plaintiffs' invitation to rule on the constitutionality of the JRA in this suit and instead encouraged the parties to enter into settlement negotiations which might afford the same protections provided by the JRA to those members of the class not covered by the Act. After negotiations conducted over almost two years, the parties failed to reach an agreement, leaving the court to rule on the constitutionality of the fee limitation as it applies to those members of the class not covered by the JRA.

The court also notes that two other relevant pieces of legislation have been enacted since the trial in this case. The Radiation-Exposed Veterans Compensation Act of 1988, P.L. 100-321, creates a presumption of service connection for thirteen diseases which manifest to a degree of ten percent within specified latency periods. The Radiation Exposure Compensation Act, P.L. 101-426, provides one time payments of $50,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and meet certain other conditions. The lump sum payment will be decreased by the amount of "any payment made pursuant to a final award of settlement on a claim" based on injuries resulting from exposure to radiation. P.L. 101-426, § 6(c)(2). It appears that veterans' benefits received may be included in this offset. 136 Cong.Rec. H12271-72 (daily ed. Oct. 23, 1990) (Conf.Rep. on H.R. 4739).

Having reviewed these public laws, the court has determined that they do not moot the claims of the class as a whole. Thus, the court must rule on the constitutionality of the fee limitation as it applies to those members not covered by the JRA or the other public laws described above.

Having considered the evidence presented at trial and the arguments of the parties, and based on the findings of fact and conclusions of law set forth below, the court holds that the $10.00 fee limitation on attorneys' fees imposed by 38 U.S.C. 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905) is unconstitutional as applied to SCDD claims for benefits based on exposure to ionizing radiation.

LEGAL FRAMEWORK

Plaintiffs argue that the $10.00 fee limit, as applied to SCDD claimants whose claims are based on exposure to ionizing radiation and who are not covered by the Veterans' Judicial Review Act of 1988, violates due process and the First Amendment because it deprives claimants of a meaningful opportunity to present their claims to the VA and to petition the government.

A court faced with a procedural due process challenge must initially determine whether the plaintiffs possess a life, liberty or property interest protected by the Constitution. In reversing this court's order granting a preliminary injunction, the Supreme Court found it unnecessary to decide whether applicants for SCDD benefits possessed a protected property interest in those benefits. *NARS II*, 473 U.S. at 320 n. 8, 105 S.Ct. at 3189 n. 8. This court sees no reason to disturb its earlier determination that both recipients of and applicants for SCDD benefits possess a property interest protected by the Constitution. *See NARS I*, 589 F.Supp. at 1313-14. Indeed, the Ninth Circuit's decision in *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), in which the court ruled that an applicant for social security disability benefits has a property interest in those benefits, buttresses this court's earlier ruling.

Once a court has concluded that the plaintiffs possess a protected interest, the court must examine the procedures provided for the protection of that interest to determine whether they meet the requirements of a due process challenge. *See NARS II*, 473 U.S. at 320, 105 S.Ct. at 3188. Determining what process is due requires consideration of the three factors set forth in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *see NARS II*, 473 U.S. at 321, 105 S.Ct. at 3189.

A deprivation of a liberty or property interest is not required as a premise for a First Amendment claim. *Perry v. Sindermann*, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 2696-98, 33 L.Ed.2d 570 (1972). Moreover, "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). The Supreme Court has held that the First Amendment protects efforts by organizations and individuals to obtain legal representation for themselves or their constituents. The First Amendment protects union members' efforts to advise workers to obtain legal advice and to recommend specific lawyers, *Brotherhood of Railroad Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1, 8-9, 84 S.Ct. 1113, 1117-18, 12 L.Ed.2d 89, *reh'g denied*, 377 U.S. 960, 84 S.Ct. 1625, 12 L.Ed.2d 505 (1964); the employment of counsel by unions to represent their members, *United Mine Workers of America Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22, 88 S.Ct. 353, 355-56, 19 L.Ed.2d 426 (1967), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 580-85, 91 S.Ct. 1076, 1079-82, 28 L.Ed.2d 339 (1971); and the efforts of non-profit organizations to provide legal representation for persons seeking to vindicate their civil rights. *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

FINDINGS OF FACT

I. *Evidence Relevant To The Private Interest Affected*

Ionizing radiation ("IR") claimants are either veterans or their survivors (usually widows). Ex. 461. The record before the court indicates that IR claimants are generally poor, and in the cases of veterans themselves, almost always in poor health. RT at 1185-86. The Legal Services Corporation estimates that more than ten percent of all poor people in the United States are veterans or their dependents. Ex. 70 at 55. Evidence introduced by plaintiffs indicates that eleven percent of IR claimants have annual family incomes below $5000, forty-three percent have annual family incomes below $10,000, and sixty-eight percent have annual family incomes below $20,000. Ex. 460 at 5. In addition, seventeen percent of IR claimants have annual family medical expenses over $20,000, twenty-nine percent have medical expenses in excess of $10,000, and forty-five percent have medical expenses in excess of $5000. *Id.*

In light of this evidence, the court finds that a substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support.

II. *Evidence Relevant To The Risk Of Erroneous Deprivation*

A. Complexity of Governing Law and Procedures

IR claims, like other SCDD claims, are adjudicated within the framework of existing Veterans Administration ("VA") rules and regulations. In addition, a series of special VA rules and regulations have been promulgated specifically to address IR claims.

Veterans' law encompasses an extensive body of statutes, regulations, and other materials. RT at 23:2-27:4, 28:5-35:1, 38:8-40:4, 40:10-41:20, 50:17. The principal applicable statute is 38 U.S.C. §§ 101-7298 (formerly 38 U.S.C. §§ 1-4098). SCDD claims are also governed by regulations codified in the Code of Federal Regulations; a body of VA General Counsel opinions and Board of Veterans' Appeals ("BVA") decisions; VA circulars; and adjudication and program manuals. RT at 23-27.

These materials interface with each other and form a complex web of governing authority. RT at 71.

The competent use of these materials is a laborious task. For example, it is necessary to monitor the Federal Register for changes in governing regulations. RT at 27. General Counsel opinions are not digested, making them difficult to research and access. RT at 32. There are numerous relevant agency manuals, including the VA Adjudication Manual (M21-1), Ex. 456, which addresses agency adjudication procedures; the VA Program Guide (PG21-1), Ex. 459; the MBVA Manual, Ex. 457, which covers areas over which the BVA has jurisdiction; and the Field Appellate Procedure Manual (M21-4), Ex. 458, which regulates the conduct of hearings in the VA's regional offices. RT at 38-40, 44. The manuals are lengthy and it is often difficult to gain access to them.[2]

Under the federal regulations governing SCDD claims, an IR claimant must "submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded." 38 CFR § 3.102. The claimant must demonstrate not only that the disability exists or that the death occurred, but also that the disability or death is "service-related." 38 U.S.C. § 1101 *et seq.*

In addition to these general regulations, in 1985 the VA adopted a special set of regulations for IR claims in response to the mandate of P.L.98-542. These regulations are codified in 38 CFR § 3.311b. Section 3.311b sets forth three prerequisites that must be met in order for an IR claim to be referred to the Chief Benefits Director for further consideration: (1) that the veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, occupation of Hiroshima or Nagasaki, Japan from September 1945 until July 1946, or other activities as claimed; (2) that the veteran subsequently developed one of seventeen diseases enumerated in the regulation; and (3) that the disease first became

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[2]For example, the M21-1 Manual consists of fifty five chapters. *See* Ex. 456.

manifest within periods specified in the regulation.[3] Where the threshold criteria are not met, a claimant may still attempt to prove his or her claim by invoking section 3.304, the general VA regulation concerning direct service connection, or section 3.309, the general VA regulation which creates presumptive service connection for certain diseases manifesting to a designated degree within a specified period after separation from service. RT at 146:23-147:3.

The record indicates that the claim development process for IR claims is far more detailed and complex than that for other SCDD claims. If the VA regional office to which an IR claim is submitted determines that the claim meets the three threshold requirements of section 3.311b, the claim is then subjected to a review process. The regional office sends the claimant a "pattern" letter requesting detailed information regarding his or her claim. The pattern letter sent to IR claimants has more questions and requests more complicated information than the pattern letter sent in other SCDD claims. RT at 74, Ex. 456 at 22-6, Ex. 751. If the claimant does not respond to the pattern letter within sixty days the claim may be administratively disallowed for failure to prosecute. RT at 190, Ex. 465, 970.

The regional office then refers the claim to the Defense Nuclear Agency ("DNA") of the Department of Defense to obtain an estimate of the radiation dose level to which the claimant was exposed. 38 CFR § 3.311b(a)(2)(i)-(ii). The general procedures followed by the DNA, including dose reconstruction methodology and dose estimate reporting standards, are codified in 32 CFR § 218.1 *et seq*. If the claimant obtains an independent dose estimate from a "credible source" and that estimate is at least double the estimate provided by the DNA, the regional office will refer the case to an independent expert for a dose reconciliation. 38 CFR § 3.311b(a)(3).

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[3]Bone cancer must manifest within thirty years after exposure; posterior subcapsular cataracts must manifest six months or more after exposure; leukemia may manifest at any point after exposure; and other diseases must manifest five or more years after exposure. 38 CFR § 3.311b(b)(4)(i)-(iv).

Upon completion of the dose estimate by the DNA, the completed file is then submitted to the Administrative Review Staff ("ARS") of the Compensation and Pension Service ("CPS"). *See* Ex. 305, M21-1, Section 22.05.1(a)(3). In general, non-IR claims are not submitted to the CPS. The ARS reviews the claim and the CPS furnishes a recommendation for either denial or allowance of the claim to the regional office. Ex. 305, M21-1, Section 22.05(e)(3). The rating board of the regional office must consider the CPS recommendation prior to making a final decision on the claim. Ex. 305, M21-1, Section 22.05.2(e)(4).

Once the rating board of the regional office has made a determination regarding the claim, it issues a Notice of Decision ("ND") to the claimant. 38 CFR § 3.103. The rating decision is based on a complicated schedule containing detailed anatomical data and other criteria. 38 CFR § 4.1 *et seq*. If the claim is denied, the claimant may file a Notice of Disagreement ("NOD") within one year of the mailing of the ND; if no NOD is timely filed, the ND is deemed final. 38 CFR § 19.129(a). If an NOD is timely filed, the regional office will reconsider its decision. If the denial is affirmed, the regional office issues a Statement of the Case ("SOC"), stating the basis for the denial. 38 CFR § 19.120.

The claimant has sixty days from the issuance of the SOC or the remainder of one year from the mailing of the ND to file an appeal. 38 CFR § 19.129(b). The appellant is not presumed to be in agreement with any statement of fact in the SOC to which the appellant does not specifically express agreement. 38 U.S.C. § 7105(d)(4). However, the claimant's appeal must set out specific factual or legal grounds for the appeal. 38 CFR § 19.123(a).

The claimant's appeal is reviewed by the BVA. If the BVA denies the appeal, the claimant may move to reconsider when there has been an obvious legal or factual error or when new evidence is discovered. 38 CFR §§ 19.104, 19.185. The claimant may also reopen the claim at the regional office level with new and material evidence.

The claimant is entitled to a hearing, upon request, "at any time on any issue involved in a claim. ..." 38 CFR § 3.103(c). The claimant is also allowed at all stages to introduce documentary, testimonial or other evidence. 38 CFR § 3.103(d).

B. Complexity of Medical Issues

The evidence before the court shows that the medical issues present in IR claims are far more complex than those in other SCDD claims and that the average claimant is not capable of understanding the medical intricacies of an IR claim.

The record reflects that there is a wide array of conflicting expert opinion in an extensive body of medical literature concerning the relationship between cancer and ionizing radiation. The evidence in this case shows disagreement about the following issues: (1) the degree of risk associated with exposure to low levels of ionizing radiation; (2) the latency periods between radiation exposure and the manifestation of certain cancers; (3) the shape of the dose-response curve for exposure to low levels of ionizing radiation; (4) the susceptibility of certain organs and tissue to cancer induction through exposure to ionizing radiation; (5) the manner in which different carcinogenic agents interact and function synergistically; (6) the validity of, and how to interpret, existing epidemiological data on the health effects of exposure to ionizing radiation; (7) the validity of reports produced by groups such as the BEIR III Committee and the United Nations Special Commission On The Effects Of Atomic Radiation ("UNSCEAR"), which the DNA and VA rely on as authoritative sources of data regard-

ing radiation exposure;[4] and (8) the validity of radioepidemiological tables relied on by the VA. RT at 621, 622, 626:2-628:3, 660-62, 1573, 3972-73, 683, 3966-87, 1578:8-25, 4768:8-4794:19, 611-12, 659:14-660:12, 675:1-7, 1574:18-1578:7, 4824:22-4826:5. *See* Exs. 1163, 1164, 1166, 1193, 1228, 1283, 1290, 1330, 1332, A-6092.

While the court need not address each of these issues, several key areas of complexity are examined below to illustrate the complicated nature of the medical issues involved in IR claims.

1. *Complexity of Causation Issues*

Because cancers are synergistic, the evaluation of different risk factors is an inherently complicated endeavor. RT at 602-03, 3256:25-3257:24, 4738:11-4739:10. The examination of a malignancy, for example, will not reveal the cause of the cancer in question. RT at 604. Thus, determining whether exposure to ionizing radiation contributed to the causation of cancer is extremely complex. The record reflects that making such a determination requires consideration of numerous factors, including the circumstances of exposure; the amount and rate of radiation exposure; the type of radiation received (gamma,

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[4]Under the auspices of the National Academy of Sciences and the Environmental Protection Agency, a committee of the National Research Council was established to investigate and report on the health consequences of radiation exposures. The Committee known as the BEIR (Biological Effects of Ionizing Radiations), has produced a number of reports. The court has been asked to take judicial notice of several of these, including the last report, BEIR V. Much of the early and ongoing work of the BEIR Committee has been testified to by experts for plaintiffs and defendant. Accordingly, this court has taken judicial notice of BEIR V and considered the discourses contained in the BEIR reports entered into evidence or judicially noticed in this case.

beta, alpha, neutron, low LET and high LET[5]); the pathways of radiation exposure; the duration of exposure; the age at manifestation of the disease; the nature of the veteran's disease; the effects of other risk factors and of exposure to other carcinogenic agents; the medical history of the veteran; the latency period between exposure and disease manifestation; the veteran's health at the time of exposure; the veteran's gender; and whether the veteran manifested acute symptoms of radiation exposure just after exposure. RT at 631:5-637:8, 1526:6-1528:14, 2308:13-2310:11, 2317:12-2318:22, 2319:25-2326:22.

Experts disagree on numerous issues with regard to cancer causation. RT at 605-06. For example, the record reflects disagreement among the expert witnesses of plaintiffs and defendant as to whether all cancers may be caused by radiation and whether certain organs may be excluded from the list of radiation-induced cancers. RT at 621, 4000-02.

2. *Complexity of Disease Classification And Manifestation Issues*

The evidence before the court indicates that determining whether a claimant's condition is covered by one of the diseases listed in the ionizing radiation regulations can present complex issues of disease classification.[6] RT at 1486:10-1494:13, 1503:1-1515:15. Statistics introduced into evidence by the plaintiffs indicate that forty-nine percent of IR claimants who

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[5]High LET radiation is radiation with dense ionization which produces a greater biological effect at lower physical doses of radiation. Low LET radiation, in contrast, has few ionizations. X rays and gamma rays are examples of low LET radiation, while alpha particles are a form of high LET radiation.

[6]Section 3.311b(b)(2) defines radiogenic diseases to include the following: (1) all forms of leukemia except chronic lymphatic leukemia, (2) thyroid cancer, (3) breast cancer, (4) lung cancer, (5) bone cancer, (6) liver cancer, (7) skin cancer, (8) esophageal cancer, (9) stomach cancer, (10) colon cancer, (11) pancreatic cancer, (12) kidney cancer, (13) urinary bladder cancer, (14) salivary gland cancer, (15) multiple myeloma, (16) posterior subcapsular cataracts, and (17) non-malignant thyroid nodular disease.

claim disability due to radiation exposure suffer from diseases not included in § 3.311b(b)(2). Ex. 460.

Assessing the period of time from exposure to manifestation of a disease is also a difficult task. RT at 683. One complication is caused by the fact that the IR regulations do not specify what is meant by manifestation; thus, manifestation may be defined as the date of cell damage, the date of pre-diagnosis manifestations, the date of onset of symptoms, or the date of diagnosis. RT at 1494:14-1502:3. Determining the date of cell damage, prediagnosis manifestations and the date of the onset of symptoms may require numerous tests and an exacting assessment of an array of medical factors. RT at 1494:14-1502:3. There is evidence in the record of claim denials based on erroneous interpretations of the regulatory manifestation periods by the VA. RT at 88, Ex. 922.

3. *Validity Of Radioepidemiological Tables*

Radioepidemiological tables have been developed by the National Institute of Health (NIH) to provide estimates of the probability of causation for various radiogenic diseases based on differing levels of exposure to radiation. The tables are relied on by the VA in assessing IR claims.

The evidence before the court demonstrates that experts disagree as to the validity of the tables. Plaintiffs' expert witnesses testified that use of the tables was inappropriate in deciding individual IR claims. Among the criticisms of the tables are that (1) they underestimate the risks of exposure to ionizing radiation, RT at 675:1-7; (2) they fail to take account of consequences of exposure to high LET radiation, RT at 673:22-674:2, 3267:7-14; (3) they fail to take into account factors important in evaluating causation, RT at 1543:20-24; (4) they fail to take into account regional variations in cancer incidence, RT at 672:17-673:21; and (5) they are subject to a high degree of uncertainty. RT at 1546:8-1548:15, 3260:22-3262:8, 4799:12-4802:13.

In light of the complexity of the medical issues involved, disagreement in the medical field with regard to cancer causation issues and the health effects of low level exposure to ion-

izing radiation, the difficulty of disease classification and of discerning disease manifestation periods, and conflicting evidence regarding the validity of radioepidemiological tables employed by the VA and of other epidemiological data available in the field, the court finds that proper presentation and adjudication of IR claims will often require the marshalling of expert medical opinion and testimony.

C. Complexity of Scientific Issues

The evidence reflects that the scientific issues involved in IR claims are extremely complex and are beyond the capacity of a lay-claimant to understand.

1. *In General*

Four types of radiation were produced by the nuclear explosions at issue in this case—gamma rays, alpha particles, beta particles, and neutron radiation. Each has distinct properties and distinct health repercussions. RT at 468. There were also different pathways of exposure. A pathway identifies the source of radiation and the route by which the radiation exposes the individual. The three principal pathways of exposure are external, internal and absorption. RT at 472:16-473:6.

Gamma rays and neutrons are the primary sources of external exposure, or exposure to the body surface. There can also be some external exposure from beta particles, but the low penetrating power of these particles means they generally expose only superficial parts of the body. RT at 473.

Sources of internal exposure via ingestion and inhalation include all sources of external exposure and alpha particles. RT at 474. The radiation dose attributable to internal exposure through inhalation depends on numerous factors, including the properties of the radionuclides inhaled, respiration rate, the characteristics of the tissues involved, and metabolism and excretion rates. RT at 474:9-475:17, 507:5-510:2, 1968:5-23. Ingestion encompasses activities such as eating and drinking contaminated food and liquid and other activities like cigarette smoking.

The third pathway is absorption, which encompasses exposure through an open wound or penetration of the intact skin by radionuclides. The degree of exposure through absorption depends on numerous factors, including the nature of the wound, the concentration of the radioactive material and the properties of the radionuclides involved. RT at 475:23-476:3, 510:3-511:21.

2. *Radiation Dose Estimates*

The record indicates that one of the most important steps in adjudication of an IR claim is estimating the dose of radiation to which the veteran was exposed. Based on the evidence introduced at trial, the court finds that estimating radiation doses is a complicated endeavor involving a multitude of factors. Among the tasks which must be undertaken in estimating the dose of radiation to which a veteran was exposed are: (1) analysis of test factors, including weapon type and yield, the veteran's location in relation to the test, weather patterns, and the type of shielding or protective gear utilized; (2) evaluation of the mode of exposure; (3) collection and interpretation of available data from test sites, including data from film badges, geiger counters and other measuring instruments; and (4) evaluation of DNA dose estimates, including analysis of models and reports used in preparation of the estimates. RT at 1931:13-1940:1.

The Defense Nuclear Agency ("DNA") furnishes radiation dose estimates to VA regional offices in connection with IR claims. When the claimant wore a film badge[7] at the time of exposure, the DNA relies on the film badge reading to determine the dose estimate. Where a substantial percentage of the unit was badged, the DNA uses dose assignment methodology to assign a dose estimate to unbadged members. Where sufficient film badge data is not available, the DNA develops generic dose reconstructions based on data collected regarding

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[7] A film badge is a small piece of film encased in a metal or plastic container which can be attached to clothing. Film badges are common means by which individual radiation exposure is measured.

a particular test site and assigns the dose estimate produced in this way to the individual claimant. RT at 3666-67.

The record indicates much disagreement regarding the validity of the dose estimates provided by the DNA. For example, there is disagreement among scientific experts with regard to the reliability of film badge data. Many test participants and occupation troops were not badged; some were badged for only a portion of their periods of exposure. RT at 531:8-534:73, 3705-06. In addition, the validity of film badge data has been questioned because the badges are directionally dependent, i.e. they more accurately measure exposure in the direction they face than exposure at other points. In addition, the badges do not measure internal exposure and do not accurately measure beta radiation exposure. RT at 516:24-521:11, 1943:19-1946:10. Moreover, the limit of some film badges used by the U.S. military to measure radiation exposure at nuclear testing sites was two rems,[8] meaning the badges were unable to record exposure at higher levels. RT at 530:17-25. Finally, plaintiffs' experts testified that the inaccuracy of film badges is exacerbated under field conditions. RT at 516:10-518:14, 529:16-530:16, 1437:5-24.

In developing dose estimates for IR claimants in the absence of film badge data, the DNA has relied primarily on generic dose reconstructions, which reconstruct the dose to which the DNA believes members of a group participating in a particular nuclear test have been exposed. Procedures for development of dose reconstructions by the DNA are codified in 32 CFR § 218.1 *et seq*. Generic dose reconstructions do not take into account particularized information concerning the activities of the individual at the test site.

The evidence demonstrates that the type of generic dose reconstruction engaged in by the DNA is extremely complex and the subject of much controversy. The DNA dose reconstructions rely, *inter alia*, on data regarding radiologic conditions obtained by analysis of data on contamination levels, soil

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[8]A rem is a unit of dose expressing the biological effectiveness of radiation.

samples, and water samples, as well as health studies, mortality studies and oral interviews. RT at 3670-3676.

Trial testimony suggests that numerous other factors should also be considered in order to develop an accurate dose reconstruction. These factors include the nature of the weapons test, the rate of radioactive decay and distribution, and the effect of environmental forces like rain and wind. Factors personal to the claimant should also be weighed. These factors include the location of the veteran in relation ground zero, activities the undertaken by the veteran, when the veteran entered the radioactive area, and the protective gear the veteran utilized. RT at 472:16-480:7 482:24-488:25, 507:5-511:2, 1931:13-1940:2, 3727:3-3731:8, 630-32.

The evidence further indicates that the ability to prepare accurate dose reconstructions is limited by numerous factors, including the passage of time and deficiencies in the monitoring devices used at test sites. RT at 512:13-513:7, 514:17-523:10, 534:8-553:12, 1450:15-1455:5, 1457:7-1458:5, 528:16-536:12, 1967:10-1968:15.

The record reflects considerable disagreement among experts regarding the accuracy of generic dose reconstructions produced by the DNA. In addition to the failure to consider the factors identified above, plaintiffs' expert witnesses offered numerous other criticisms of the DNA reconstructions. For example, the assumptions employed in the DNA models are alleged to frequently be inaccurate and not properly documented. RT at 536-38, 562-64, 572:25-574:16, 584:4-585:14, 1355-57, 1948-49, 2049-65. In one case, plaintiffs' expert witness testified that the DNA model for Operation Crossroads made inaccurate assumptions concerning both the relevant radiation field and the behavior of the combat teams in the test area. These incorrect assumptions allegedly led to an underestimation of exposure. RT at 2005-2040. The generic dose reconstruction for Shot Simon also appears to have been based on inaccurate assumptions regarding troop movements. RT at 2018-22, 3753-54, 2035:5-8, 2029:7-20, 2028:23-2030:4.

In addition, there is trial testimony that the models for some tests fail to consider material pathways of radiation exposure. RT at 564:10-566:16, 1432-34, 2049-65, 1986-87. For example, plaintiffs' expert testified that the model for Operation Crossroads failed to consider contaminated air, soil and lagoon water, among other factors, as possible sources or pathways of radiation exposure. RT at 564-71. Two General Accounting Office reports introduced into evidence raise additional questions regarding the validity of the dose reconstruction model for Operation Crossroads. Ex. 555, 1342.

Certain DNA dose reconstruction models are alleged to improperly evaluate internal exposure. RT at 1970-76. For example, the Shot Simon dose reconstructions failed to consider ingestion, while the evidence shows that the ground troops were issued bag lunches to take with them to the test site. RT at 1998:18-1999:7. There is also evidence that some DNA models utilize faulty uncertainty analysis, thus disguising the degree of uncertainty in the models and overestimating the accuracy of the calculation produced. RT at 576-78, 1955:15-1962:6, 2039:3-22.

In light of the evidence in the record and the numerous factors relevant to dose estimates cited above, the court finds that individualized dose reconstructions, tailored to the particularities of the individual claim, are more accurate predictors of the radiation exposure of an individual than generic dose reconstructions. RT at 488-90, 506:12-507:4, 591-92. The court also finds that particularized information concerning a veteran's activities at a nuclear testing site can be extremely useful in obtaining an accurate individual dose reconstruction. RT at 505:25-507:4.

The court further finds, based on the evidence demonstrating the complexity of radiation dose reconstruction and the disagreements in the field concerning the validity of film badge data and the development and application of dose reconstruction methodology, that adequate presentation and adjudication of IR claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated.

D. Complexity of Factual Development

Given the tremendous diversity and complexity of the medical and scientific issues involved in IR claims, it is not surprising that properly developing the facts underlying these claims is an extremely intricate undertaking. A plethora of information is useful in establishing pathways to which a veteran might have been exposed at the time of the nuclear explosion and other factors which may have contributed to the claimant's health problems. Such information is essential to proving the level of radiation exposure, completing an individual dose reconstruction and demonstrating causation.

Among the information which can be vital to an IR claim is where the veteran was located at the time of the explosion. In the case of veterans stationed on ships, where the ship was berthed and where on the ship the veteran was bunked are both extremely relevant. RT at 164-65. Activities undertaken by the veteran, such as decontamination of a ship or participation in a landing party disembarking on a contaminated island, are pertinent. What type of bomb was exploded, when the veteran entered the radioactive area and how long he remained there, what type of protective shielding was available and if and when the veteran used it are all germane to an IR claim and therefore should be a part of complete factual development. RT at 630-32.

The fact development process is greatly complicated by the fact that much of the necessary information is not easily obtained. For example, numerous documents must be collected and provided to a health physicist if an independent and individualized dose reconstruction is to be completed. These documents include technical reports concerning the test, internal dose assessments, and documents showing the whereabouts and activities of the veteran. RT at 1113-14. Many important documents, such as ship blueprints and other materials important to identification of pathways of exposure must be obtained from the appropriate government agencies by making a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Some documents may be classified, thus requiring declassification through the Secrecy Act, 50 U.S.C. § 401. In

addition, it often is extremely useful to discover the identity of other veterans who participated in a particular test along with the claimant in order to obtain information regarding the claim. This information is difficult to acquire and often must be obtained through the Privacy Act, 5 U.S.C. § 552a.

III. *Evidence Relevant To Existing Safeguards*

There are several facets of the VA claim adjudication system which are designed to safeguard the procedural rights of SCDD and IR claimants. The court now turns to an examination of the evidence with respect to these supposed safeguards.

A. Presumptions in Favor of the Claimant

Section 3.309 creates a presumption of service connection for enumerated diseases which manifest in a compensable degree within applicable time limits. 38 CFR 3.309. Therefore, claimants who can demonstrate that they have been afflicted by a specified disease within the appropriate manifestation period need do nothing more to prove service connection.

While section 3.309 creates a presumption in favor of the claimant, evidence presented at trial demonstrates the illusory nature of this safeguard. First, manifestation periods are often difficult to determine, and as the evidence before the court concerning the complexity of medical issues demonstrates, it will frequently be a complicated task for a claimant to prove precisely when a disease first manifested itself. RT at 1494:14-1502:3.

Second, the presumptive periods created by section 3.309 have been misapplied by the VA to the detriment of claimants, leading to the erroneous denial of claims. RT at 89, 146, Ex. 922. Ex. 454 [NAM004 0441]. For example, the VA denied plaintiff Reason Warehime's IR claim for lung cancer because the cancer did not manifest within one year of exposure. Ex. 454 [NAM004 0441]. However, while sections 3.307 and 3.309 create a presumption of service connection for malignant tumors which manifest themselves within one year from the termination of military service, nowhere do these regulations

create a presumption that a malignant tumor is not service-connected if it does not manifest within one year.

Third, the threshold requirements of section 3.311b can function to offset the protections of the presumptive periods in that the VA may deny claims which fail to meet one of the three threshold requirements even when the claimant might be eligible for benefits under section 3.309. RT at 145-47.

The court finds that section 3.309 does not effectively safeguard the rights of IR claimants or contribute in any significant way to the proper adjudication of IR claims.

When "a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." 38 CFR § 3.102. The evidence indicates that in IR claims the "reasonable doubt" provision does not provide a significant safeguard to the claimant. RT at 148-50. Section 3.102 defines reasonable doubt as "an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." The sharp disagreements among experts concerning many of the medical and scientific factors central to determining the validity of an IR claim makes application of the reasonable doubt standard exceedingly difficult. The synergistic nature of cancers makes application of the standard even more problematic, especially in light of the provision in section 3.311b(g) that service connection will not be established "if there is affirmative evidence to establish that a supervening, nonservice-related condition or event is more likely the cause of the disease." RT at 149, 434-35.

There is absolutely no evidence in the record to suggest that the reasonable doubt standard codified in section 3.102 has been employed by the VA in IR claims in a manner beneficial to claimants.

B. Informal and Non-Adversarial Nature of the VA Adjudication System

No evidence was presented at trial which supports the notion that the supposedly informal and non-adversarial nature

of the VA adjudication system for IR claims serves as a safeguard for claimants.[9]

The record indicates that the factual development of IR claims conducted by VA regional offices is extremely limited. An abstract of a random selection of 674 IR claims files prepared by plaintiffs indicates that no dose estimate was obtained by the VA regional office in fifty-nine percent of IR cases and that no physical exam was conducted in forty-eight percent of the claims. Ex. 461. Trial testimony suggests that those medical exams which do occur are of questionable quality. RT at 93:15-94:5. Indeed, in 509 cases the VA appears to have done no independent factual development. The lack of factual development appears to be due to the complicated nature of IR claims and to the fact that the VA's "work product" schedule does not provide additional work credits for IR claims, even though if adjudicated properly these claims clearly would be far more time-consuming than other SCDD claims. Ex. 458. Thus, there is an institutionalized incentive to underprepare the IR claims.

The evidence shows that in the vast majority of IR claims the VA does little in the way of fact development other than to collect the claimant's service and medical records and send the claimant a pattern letter. For example, the VA does not contact and interview other members of the claimant's former unit and does not seek the medical and military records of those members in order to detect patterns of exposure or disease among those individuals. RT at 3115:20-3117:22.

In light of the complex medical and scientific issues involved, the difficulty of obtaining appropriate records, and the limited ability of a lay-claimant or service representative to comprehend the relevant issues, pattern letters alone are not a sufficient or effective means of fact development. RT at 75, 96-98, 2332-33, 2344-47, 2349-50. Moreover, the use of complicated pattern letters acts to the claimant's detriment in that if the

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[9]The court notes that characterizing the byzantine procedures described in this order as "informal" appears to strain the meaning of the term.

claimant fails to respond to the pattern letter within sixty days, the claim may be administratively disallowed for failure to prosecute. RT at 168-69, Ex. 456, M21-1 Manual, §§ 7.01, 16.03.

Referral of IR claims to the Compensation and Pension Service ("CPS") for review and a recommendation provides little additional protection. Claimants are not given a hearing before the advisory review staff of the CPS. RT at 78:9-79:5. In addition, trial testimony indicates that the CPS staff have little training or expertise in radiation exposure. RT at 98-99. The importance of the lack of expertise of the CPS staff is magnified by the fact that at the time of trial, no IR claim had been identified where the rating board of the regional office had failed to follow a recommendation made by the CPS. Jt. Pretr. Conf. Stat. at 22.

The evidence before the court does not bear out the government's contention that the VA adjudication system for IR claims functions in a non-adversarial manner so as to safeguard the claimant's interests. Instead, the court finds the testimony of Keith Snyder, attorney for the Vietnam Veterans of America and the National Veterans Legal Services, to be credible and persuasive on this matter. Mr. Snyder testified that the VA's adjudication of IR claims is more accurately characterized as adversarial. RT at 257-59. The evidence supports Mr. Snyder's contention.

The record is replete with examples of the VA's lack of solicitude for IR claims and agency behavior that demonstrates a disregard for the procedural and substantive rights of IR claimants. *See, e.g.*, RT at 1086-94. For example, there is evidence that the VA actively discourages IR claimants from invoking their right to a hearing where they could more fully present their claims, provide expert medical and scientific testimony and respond to rating board concerns. Ex. 18 at 11, 17 at 137-39, 1042. Personal hearings are held in only 5.69% of IR claims. In less than one percent of the cases are those hearings held prior to the VA's initial determination. RT at 250. IR claimants are discouraged from requesting hearings despite the fact that the evidence shows that those claimants who have

hearings have a substantially higher success rate than those who do not. RT at 248-50.

The record indicates that, either by design or neglect, the VA has operated in such a manner so as to frequently put the claimant at a disadvantage in the adjudication process. Materials important to development of an IR claim often are not made available at VA regional offices. RT at 258. The vast array of materials, General Counsel opinions, and other documentation relevant to IR claims are not indexed so as to make them accessible to a lay-claimant. *Id.* And pattern letters sent to the IR claimant solicit information adverse to the claim without requesting information tending to prove it. RT at 259-60.

One example of the adversarial functioning of the VA adjudication of IR claims is the case of plaintiff Reason Warehime. At the time of trial, Warehime had been waiting eight years for resolution of his various IR claims. Ex. 454 [NAM003 0628-0632, NAM003 1000]. His claims had been remanded by the BVA to the VA's Northern California regional office on five separate occasions. The record of the adjudication of Warehime's IR claims contains an almost interminable string of lengthy delays, poor fact development and other forms of agency inaction and neglect which are both unjustified and clearly not in the claimant's interest. *See* Ex. 454.

In light of the above evidence, the court finds that the supposed informal and nonadversarial nature of the VA adjudication process for IR claims does not provide a significant safeguard for IR claimants.

C. Availability of Service Representatives

Volunteer service representatives are made available to IR claimants through various veterans organizations. In an ordinary case of impact injury or in other cases of a routine nature these representatives appear to do an adequate job. However, as explained below, these service representatives are unable to do a competent job for IR claimants or to provide adequate safeguards for them.

While service representatives undoubtedly are well-intentioned, their "crushing" caseloads make effective representation of claimants with complicated IR claims virtually impossible. Ex. 70. For example, the Disabled American Veterans employed ten appeals-level service representatives who handled 17,954 claims in Fiscal Year 1986; the two representatives of the AmVets presented 1304 claims to the BVA the same year. RT at 1780-82, Ex. 263.

Training of service representatives is very limited, and they receive no specialized training in the intricacies of IR claims. RT at 1174-75, 1177. As a result, service representatives often do not detect errors in VA denials of IR claims. RT at 1178-83.

In addition, the evidence shows that service representatives do little in the way of fact development for IR claims, instead relying almost exclusively on the claimant to marshal the complicated array of materials and information necessary to successfully present a claim. RT at 1107:23-1108:5, 1704:22-1707:2, 1712. For example, service representatives rarely obtain independent medical exams for claimants. RT at 1706. Worse yet, it appears that in most cases service representatives do not meet with the claimant before a rating decision is made. RT at 1708.

Service representatives rarely request a hearing for the claimant before the rating board and often discourage veterans from requesting a hearing prior to denial of the claim by the regional office. RT at 1150, 1730, Ex. 236. The record suggests that in those instances where a service representative does obtain a hearing for the claimant and represents the claimant, the representative often does not perform effectively as an advocate. RT at 1149-50, 1160-65, 1736. Frequently, the representative meets with the claimant for the first time one hour prior to the hearing. RT at 1149.

The evidence also indicates that service representatives are not an effective safeguard in appeals of claim denials before the BVA. Service representatives frequently fail to notify claimants of their right to appeal, and as a result, claimants

often fail to exhaust their administrative remedies. RT at 1714. Where the claimant is advised of his or her right to appeal, in most cases the claimant fills out the substantive appeal form without the assistance of the service representative. RT at 1159-60, 1724. This occurs despite the fact that the claimant is deemed to accept any factual finding in the Statement of the Case not disputed in the substantive appeal form. Service representatives rarely request hearings on behalf of the IR claimant before the BVA. RT at 1733. Appeals briefs prepared by service representatives are often inadequate. RT at 1158.

In sum, the evidence strongly suggests that there is little difference in quality between claims prepared solely by the IR claimant and those prepared with the assistance of a service representative. RT at 1169. The deleterious effects of the service representatives' almost total reliance on the claimant is magnified by the fact that the average veteran claimant has only an eleventh grade education. Ex. 461. Thus, service representatives do not provide any significant safeguard to the IR claimant.

IV. *Evidence Relevant to the Probable Value of Attorneys in Reducing the Risk of Erroneous Deprivation*

The record indicates that preparation of ionizing radiation claims involves a wide variety of tasks for which attorneys are trained and particularly well-suited. Attorneys frequently are trained and experienced in the use of FOIA, the Secrecy Act and the Privacy Act to obtain government documents. The record indicates that attorneys are very effective at obtaining records necessary to document an IR claim from the numerous government agencies involved. RT at 241:5-244:5. Such skills are essential for successful presentation of IR claims, given the frequent need to rely on government documents to, for example, analyze and critique DNA generic dose reconstructions.

Attorneys are frequently experienced in claim development and would be invaluable in insuring that claimants supply information requested by the VA in a timely manner, thus avoiding such possibilities as administrative denial for

failure to respond adequately to a pattern letter. RT at 169:14-171:1, 171:8-172:1, 173:22-175:1.

The record demonstrates that the complexity of the scientific and medical questions at issue in IR claims frequently makes expert testimony and opinion of great importance. Attorneys are skilled and experienced in working with experts in support of legal claims. In the case of IR claims, experts must examine military service records, military medical records and numerous other documents which must be obtained through FOIA requests. Attorneys can effectively facilitate collection of these documents for use by experts. RT at 640:1-641:16, 2330:19-2332:4, 2352:22-2353:10. Attorneys are also trained to be and are effective at framing the legally relevant issues for experts and at understanding the legal standards by which those issues will be judged. This training would contribute substantially to the work of medical and scientific experts in IR claims. RT at 640:1-641:16, 2353:11-18, 1425:19-2427:3.

Based on the evidence presented at trial, the court finds unequivocally that attorneys would perform far better than volunteer service representatives in other areas which are key to proper presentation of an IR claim. Attorneys would conduct more detailed and thorough factual development. RT at 1074:13-1087:18, 1094:6-1096:22, 1104:6-1106:8, 1107:12-22, 1110:20-1115:3, 1116:15-25. Attorneys would respond to VA requests for information, rather than leaving the lay-claimant to his or her own devices to respond to complex questions. RT at 1747:4-1748:12. Attorneys are more likely to detect and respond to procedural violations by the VA and to ensure that the claimant effectively takes advantage of procedural protections such as the right to a hearing. RT at 182:23-183:15, 250:22-253:15. Attorneys are better able to track down the relevant regulations, manual provisions and internal documents of the VA in order to muster support for their clients' IR claims and to interpret the myriad of complex regulations and rules relating to IR cases. Moreover, attorneys, because of their training, can more competently prepare briefs and appellate papers, conduct legal research, apply the law to the facts, and bring

legal challenges to mistaken agency interpretations of regulations and statutes. RT at 80:20-81:12, 131:22-132:2, 183:20-184:25, 1723:4-1726:19, 1170:1-1171:8, 1748:13-1751:17, 1152:23-1159:21, 1161:20-1164:22.

Finally, the evidence demonstrates that IR claimants who employ attorneys have had significantly higher success rates than those relying on service representatives. RT at 877:3-880:21, 980:12-982:15, 851:8-23, 984:16-987:11, 881:4-21, 957:16-958:10, Ex. B-22.

CONCLUSIONS OF LAW

I. *Due Process*

As discussed above, while the Supreme Court determined that the fee limitation challenged by plaintiffs was not unconstitutional on its face, it left open the possibility of a successful constitutional challenge by plaintiffs with complex claims different from the typical VA claim. *NARS II*, 473 U.S. at 337-38, 105 S.Ct. at 3197-98. The Court found that the record at the preliminary injunction stage did not identify a category of "complex cases" for which the process provided was insufficient. *Id.* at 329-330, 105 S.Ct. at 3193. The Court, however, recognized the possibility that the fee limitation might be found unconstitutional as it applied to "some discrete class of complex cases." *Id.* at 337, 105 S.Ct. at 3198.

Plaintiffs returned to this court and proceeded only on claims based on ionizing radiation as a cause for disability or death. The evidence discussed in the findings of fact amply demonstrates that, because of the extreme complexity of governing law, applicable procedures, medical and scientific issues, and necessary factual development, IR claims are exceptionally complex and are thus distinguishable from those of the typical VA benefits claimant.

The complexity of establishing causation of cancer and other diseases by toxic agents has been well-recognized in the context of toxic tort suits. *See, e.g.*, Mark S. Ellinger, *DNA Diagnostic Technology: Probing the Problem of Causation in Toxic Torts*, 3 *Harv.J.L. & Tech.* 31 (1990); Charles Nesson, *Agent*

Orange Meets the Blue Bus: Fact finding at the Frontier of Knowledge, 66 *B.U.L.Rev.* 521 (1986); Mary Carter Andrues, Note, *Proof of Cancer Causation in Toxic Waste Litigation: The Case of Determinacy Versus Indeterminacy*, 61 *S.Cal.L.Rev.* 2075 (1988); Note, *Developments in the Law: Toxic Waste Litigation*, 99 *Harv.L.Rev.* 1458, 1617-31 (1986); Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 *Yale L.J.* 376 (1986); Orrin E. Tilevitz, Note, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 *Colum.J.Envtl.L.* 344 (1977).

"The latency factor as well as the background incidence of [these diseases] ... engender a causal indeterminacy which hampers the ability to isolate the substance which induced the injury." *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 173-74 (W.D.Mo. 1988). In this opinion of over two hundred pages, one appellate court demonstrated the extraordinary difficulties in establishing causation where toxic agents and a myriad of symptoms are involved. Uncertainty and disagreements within the scientific community make it difficult even for persons trained in the law to present a cogent, persuasive case. *See Rubanick v. Witco Chemical Corp.*, 125 N.J. 421, 593 A.2d 733 (1991) (citing to a number of cases confronting the evidentiary and causation difficulties in toxic tort type cases). It is a daunting, if not impossible, task for a layperson or one without access to legal resources to compile evidence that is methodologically sound and will pass muster.

As can be seen in this court's findings above, the complexities and uncertainties in IR cases are even greater than most of the difficult toxic tort cases. Applying the *Mathews* test to the evidence in the record regarding IR claims, the court concludes as a matter of law both that the "private interest" at stake in IR claims is great and that the risk of erroneous deprivation of that interest is high. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

The court further concludes that those features of the existing adjudication procedure which are intended to safeguard the interests of the IR claimant in fact do not serve that purpose. Specifically, the court concludes that the regulatory pre-

sumptions in favor of the client, the supposedly informal and non-adversarial nature of the VA adjudication procedure for IR claims, and the availability of service representatives from volunteer veterans organizations do not contribute in any significant way to ensuring that the legitimate interests of the claimant are protected and that IR claims are properly adjudicated.

In addition, the court concludes, based on the above findings of fact, that allowing IR claimants access to attorneys would be of great value as a procedural safeguard. Attorneys would provide extremely valuable and presently unavailable assistance to claimants in such key areas as factual development, marshalling of expert opinion on scientific and medical issues in dispute and effective utilization of statutorily guaranteed procedural rights. Volunteer service representatives are not effectively providing such assistance to claimants.

Having arrived at these conclusions of law, under the terms of *Mathews* the court must now examine the government interest in adhering to the challenged system. The Supreme Court, in reversing the preliminary injunction order, identified the government interest at stake as follows:

> that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

NARS II, 473 U.S. at 321, 105 S.Ct. at 3189. The Court further stated that the government interest identified was reinforced by an absolute prohibition on compensation of any service organization representative. *Id.* at 321-22, 105 S.Ct. at 3189. Fearing that "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible" and that the VA adjudication system would be "rendered more adversary and more complex by the very presence of lawyer representation," the Court ac-

corded great weight to the government interest. *Id.* at 326, 105 S.Ct. at 3191.

Regardless of the merit of the Court's analysis at the time, subsequent developments have robbed it of all validity.[10] In

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[10]Chief Justice Rehnquist's analysis implies that the real goal of the fee limitation was to prevent attorneys from participating in the adjudication of veterans' benefit claims, since only this would realize the government interest identified by the Court, i.e., preserving the "simple" nature of the procedures by keeping attorneys out. In fact, as Justice Stevens pointed out in his dissent in *NARS II*, the purpose of the fee limitation when enacted was not to prevent the employment of reputable counsel but instead to protect veterans from unscrupulous lawyers. *NARS II*, 473 U.S. at 360, 105 S.Ct. at 3210 (Stevens, J., dissenting). A $10 fee in 1862, the year the fee limitation was enacted, was roughly equivalent to a $580 fee today. *Id.* at 361, 105 S.Ct. at 3210. Thus, the fee limitation initially allowed for the employment of an attorney by a veteran claimant while the fee limitation at present does not.

Moreover, even prior to the passage of the Judicial Review Act of 1988, which definitively laid to rest the Chief Justice's government interest analysis, there were strong indications that the fee limitation, as written, no longer served a legitimate interest. In 1982 the Senate Committee on Veteran Affairs had the following to say about the fee limitation:

> [T]he basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in the belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans'. ... Whatever the merits of such a view at the time the limitation was imposed, ... it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.
>
> The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters ... [A]n individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some

1988, Congress passed into law and the President signed the Veterans' Judicial Review Act of 1988 ("JRA"), P.L.100-687, 102 Stat. 4105, which partially repeals the challenged fee limitation and allows those veteran claimants who file a Notice of Disagreement with the Veterans Administration to retain an attorney for any proceedings following the Board of Veterans' Appeals initial final decision on a benefits claim. Consistent with the government's interest in protecting veterans from unscrupulous attorneys, the JRA requires BVA review and approval of the fee agreement between the claimant and retained counsel and limits contingency fees to twenty percent of the claimant's total benefit award. 38 U.S.C. § 5904(c)(2), (d)(1).

As enactment of the JRA makes clear, Congress and the President have determined that the challenged fee limitation is not in the national interest and that that interest instead requires allowing veteran claimants to utilize attorneys in VA proceedings after the BVA's initial final decision. Congress and the President have now clearly spoken on the nature of the government interest in these matters, and this court cannot and will not question this determination.

It is true that the JRA does not eliminate the fee limitation for claimants who filed their Notice of Disagreement prior to November 18, 1988, the date the law was enacted. Indeed, those claimants form the remainder of the class with active claims in this litigation. However, this court can conceive of no rational manner in which the government interest with regard to attorney participation in the VA adjudication process could be one thing for claimants who filed their NOD prior to November 18, 1988 and another for those who file after. Clearly, the adjudication process is the same for both groups of claimants, as is their need to be protected from unscrupulous attorneys.

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further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record.

S.Rep. No. 97-466, 97th Cong., 2d Sess. at 50-51 (1982).

In addition, in December 1988 the VA adopted new regulations which state, in relevant part, that an attorney "may receive a fee or salary in excess of the statutory limit from an organization, governmental entity or other disinterested third party for representation of a claimant." 38 CFR § 14.634(a). The regulation exempts veterans' organizations and other interested groups from the $10 fee limit. Here again, the court cannot conceive of any rational government interest which would be served by effectively preventing individual claimants from retaining the assistance of counsel for adjudication of their VA claims when non-profit organizations may retain these same attorneys for the same purpose.

Finally, there is no evidence in the record and no reason to believe that the costs of administration of the IR claim adjudication system would increase because a claimant is represented by counsel as opposed to being represented by a volunteer service representative or appearing *pro se*. *NARS II*, 473 U.S. at 363, 105 S.Ct. at 3211 (Stevens, J., dissenting).

Therefore, this court concludes that the government has no significant interest in retaining the challenged fee limitation. Plaintiffs have made an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility. Given the absence of any countervailing government interest, the court concludes that, as a matter of law, the $10 fee limitation violates the due process rights of ionizing radiation claimants and is thus unconstitutional.[11]

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[11]The case at bar is easily distinguishable from the Supreme Court's recent decision in *United States Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990). That case involved a due process challenge to a statute which allows for payment of a "reasonable attorney's fee" to an attorney who successfully represents a black lung claimant but requires that the fee be approved by the appropriate government agency. *Triplett*, 110 S.Ct. at 1430. The $10 fee limitation at issue here, of course, does not provide for a reasonable attorney's fee for the attorneys of IR claimants. Moreover, in *Triplett* the Court ruled that the challenged statute did not

II. *First Amendment*

Plaintiffs maintain that the fee limitation violates the First Amendment by denying them the right to petition the government for redress, which includes the right to meaningful access to adjudication.[12]

In reversing the preliminary injunction order in this case, the Supreme Court expressed reservations regarding some elements of this court's First Amendment analysis. *See NARS II*, 473 U.S. at 334-35, 105 S.Ct. at 3196. For example, the Court noted perceived "conceptual difficulties" in applying *United Mine Workers*, 389 U.S. 217, 88 S.Ct. 353 and *Brotherhood of Railroad Trainmen*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89, which were cited in the preliminary injunction order, to the case at bar. *NARS II*, 473 U.S. at 334, 105 S.Ct. at 3196. The Court also labelled as a "questionable proposition" the notion that IR claimants have a First Amendment right to retain a "surrogate speaker" to speak for them in VA adjudication proceedings. *Id.* at 335, 105 S.Ct. at 3196. Ultimately, however, the Court deemed plaintiffs' First Amendment argument unpersuasive because, on the record at the preliminary injunction stage, the Court found that plaintiffs had an opportunity to make a meaningful presentation under the existing VA claims process.

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violate due process because the record did not establish that, as a result of the fee restriction, attorneys were unavailable to black lung claimants. *Triplett*, 110 S.Ct. at 1433-35. In contrast, in the case at bar both the record and common sense lead to the inexorable conclusion that the $10 fee limitation make attorneys unavailable to ionizing radiation claimants. Indeed, the Supreme Court assumed this to be the case even based on the limited record before it at the preliminary injunction stage. *Triplett*, 110 S.Ct. at 1433.

[12]Plaintiffs also argued that the fee limitation violated the right of plaintiff NARS to offer its members competent legal representation. With the enactment of 38 CFR § 14.634(a), which exempts voluntary organizations such as NARS from the fee limitation, this claim is now moot.

While the record before the Supreme Court at the preliminary injunction stage was limited, it is now fully developed. As the above findings of fact and conclusions of law with regard to plaintiffs' due process claim make clear, this court has now determined that the system challenged by plaintiffs does not afford IR claimants a meaningful opportunity to present their claim to the government in light of the intricacies of the governing law and adjudication process at issue, the substantive complexities of ionizing radiation claims, and the illusory nature of existing safeguards to claimants' interests. The court, therefore, must determine whether this infringes on plaintiffs' First Amendment rights.

Application of the union cases and *Button* in the instant litigation may well present some "conceptual difficulties" because those cases involve the right of organizations to seek legal representation for constituents, while the right of the individuals themselves to legal representation is at issue in the instant case. On closer examination, however, this distinction alone is not dispositive. As the Supreme Court has made clear,

> [u]nderlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. *This concern applies with at least as much force to aggrieved individuals as it does to groups.*

Bates v. State Bar of Arizona, 433 U.S. 350, 376 n. 32, 97 S.Ct. 2691, 2705 n. 32, 53 L.Ed.2d 810, *reh'g denied*, 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1977) (emphasis added). Lower courts have not limited application of *Button* and the union cases to situations involving organizational legal action. See *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir.1985) (invoking *Button* in support of proposition that actions of a prisoner who assisted fellow prisoners in preparing habeas petitions were protected by the First Amendment); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990) *cert. denied, Welsh v. DeLoach*, — U.S.—, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991) (citing *Button* and *United Mine Workers* to support ruling in section 1983 action that retaliation for plaintiff's decision to retain counsel when a suspect in a criminal prosecution could constitute a violation of plain-

tiff's First Amendment right of association and free speech); *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir.1981) (citing *Button* to support ruling that husband's activities, assisting spouse in preparation of Title VII law suit, were protected by the First Amendment). This court thus concludes that the First Amendment guarantees an individual meaningful access to the adjudicatory process and protects efforts to obtain legal representation to effectuate this access.

The weight of plaintiffs' First Amendment interests is not diminished because ionizing radiation claimants seek meaningful access to the adjudication procedures of an administrative agency. As the Supreme Court observed in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972), the First Amendment protects the right to petition an administrative agency:

> [t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government ... the right of access to the courts is indeed but one aspect of the right to petition.

The fact that plaintiffs in this case seek economic compensation from the VA for the health repercussions of exposure to ionizing radiation, rather than seeking only to make a political statement through their actions, does not deny plaintiffs First Amendment protection. *See, eg., United Mine Workers*, 389 U.S. at 221-22, 88 S.Ct. at 355-56 (First Amendment gives union right to hire attorney to assist members in processing of workers' compensation claims). Moreover, as the tremendous public interest generated by this case and the flurry of legislative activity with regard to "atomic veterans" demonstrates, the ionizing radiation claims at issue here implicate important political values. Indeed, ionizing radiation claimants have found themselves at the center of a political controversy concerning the safety of nuclear testing and weapons and the government's responsibility to provide for veterans allegedly exposed to radiation during military service.

It is also now beyond question that the First Amendment protects plaintiffs' right to pay another to assist them in effectuating their right to petition. In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), the Supreme Court struck down a Colorado statute prohibiting payment of initiative petition circulators, holding that the statute infringed on appellees' First Amendment right to petition the government and was not narrowly tailored to achieve the government's stated goal. The *Meyer* Court also rejected the argument that appellees had other effective means to disseminate their ideas, observing that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424, 108 S.Ct. at 1893.

If anything, plaintiffs' position is more compelling than that of appellees in *Meyer*. As this court's findings of fact demonstrate, retaining counsel is often plaintiffs *only* means of effectively pursuing their ionizing radiation claims. In such a context, there can be no doubt that plaintiffs' First Amendment right encompasses the right to pay an attorney for legal assistance and the $10 fee limitation trammels plaintiffs' First Amendment interests.

Restrictions on First Amendment interests pass constitutional muster only when they are narrowly tailored to serve a legitimate state interest. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 789, 108 S.Ct. 2667, 2673, 101 L.Ed.2d 669 (1988). As discussed above, the Veterans' Judicial Review Act, removes the $10 fee limitation for many ionizing radiation claimants. As a result, the government can hardly maintain that it has a continued interest in preserving the supposed "informal" and "non-adversarial" nature of the VA adjudication process by effectively denying attorneys to those not covered by the terms of the JRA. Even assuming *arguendo* that the state could legitimately retain an interest in protecting those IR claimants not affected by the JRA from unscrupulous lawyers, this "paternalistic" government interest could not counterbalance the plaintiffs' First Amendment rights. In *Riley*, the state of North Carolina attempted to de-

fend statutory limits on the fees of professional solicitors of charitable contributions with "the paternalistic premise that charities' speech must be regulated for their own benefit." 487 U.S. at 790, 108 S.Ct. at 2674. Finding this purported government interest to be unsound, the Court noted:

> [t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. ... To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners ...

Id., 487 U.S. at 790-91, 108 S.Ct. at 2674 (citations omitted).

Moreover, even if there were legitimate government interests at stake in this case, the fee limitation is not narrowly tailored to serve them. For example, the state's paternalistic interest in protecting IR claimants from unscrupulous attorneys would be equally served by the type of "reasonable fee" provision contained in the JRA, while at the same time allowing IR claimants the opportunity to obtain legal representation. In addition, the government might temper the formality and adversarial nature of the IR claim adjudication process by, for example, limiting the number of hearings, the length of written submissions, and the time for argument. *See NARS II*, 473 U.S. at 363, 105 S.Ct. at 3211 (Stevens, J., dissenting).

For the foregoing reasons, the court concludes that the $10 fee limitation violates plaintiffs' First Amendment right to free speech and to petition the government.

CONCLUSION

In light of the above findings of fact and conclusions of law, the court rules that the $10 fee limitation violates plaintiffs' constitutional rights under both the Fifth and First Amendments.

IT IS SO ORDERED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.	)	No. 92-15988
Plaintiffs-Appellees,	)	D.C. No. CV-83-01861-MHP
v.	)	ORDER
EDWARD J. DERWINSKI, Secretary of the Department of Veterans Affairs, et al.,	)	
Defendants-Appellants.	)	

Filed: June 18;, 1993

Before: CHOY, ALARCON and HALL, Circuit Judges.

The opinion filed November 24, 1992, slip op. 13643, is amended as follows:

> Delete footnote 3 on slip opinion page 13648 and renumber the remaining footnotes accordingly; also, delete the last sentence of he first paragraph on slip opinion page 13652 and footnote 7; and further, insert "to" between "right" and "free speech" on slip opinion page 13647, first paragraph, second to last line.

With these amendments, the panel has voted to deny both Appellee's and Class Plaintiffs-Appellees's petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the amendments set forth above, and of the suggestions for rehearing en banc and

no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

38 U.S.C. § 3404. Recognition of agents and attorneys generally (prospectively repealed 1988)

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and,

(3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. § 3405. Penalty for certain acts (prospectively repealed 1988)

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

Supreme Court, U.S.
FILED
OCT 14 1993
OFFICE OF THE CLERK

93-438

No. _____

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OCTOBER TERM, 1993

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Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE

Alliance for Atomic Veterans, Citizen Soldier, Health and Energy Institute, Military Family Support Network, National Committee for Radiation Victims, Natural Rights Center, Nuclear Information and Resource Service, and Veterans Due Process, Inc.

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For The Ninth Circuit

BRIEF OF AMICUS CURIAE

Alliance for Atomic Veterans, Citizen Soldier, Health and Energy Institute, Military Family Support Network, National Committee for Radiation Victims, Natural Rights Center, Nuclear Information and Resource Service, and Veterans Due Process, Inc.

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QUESTIONS PRESENTED

1. Upon this Court's remand to consider the constitutionality of the fee limitation as applied to complex claims, was the District Court free to hear evidence and to make further factual findings relating to these remanded claims? If so, was the Court of Appeals free to ignore those factual findings absent a determination that they were clearly erroneous?

2. Under this Court's standard for measuring procedural due process, plaintiffs must show the *risk* of an erroneous deprivation of a property interest and the *probable value* of additional safeguards. Did the Court of Appeals err by requiring petitioners to show instead:

> — not only a risk of erroneous deprivation, but also that a significant number of petitioners' claims had been wrongly decided?
>
> — not only the probable value of a lawyer's assistance, but also that lawyers are absolutely "necessary" to ensure procedural fairness?

3. Did the Court of Appeals err in treating selected excerpts of "legislative history" to unenacted statutes as supplanting the District Court's specific factual findings regarding the operation of the veterans' benefit claims system as applied to petitioners?

4. Did the Court of Appeals err by refusing to examine petitioners' First Amendment claims under a standard of strict scrutiny that requires that the fee limitation be narrowly tailored to serve a compelling governmental interest?

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In the
Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,
Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

Amici public interest organizations, Alliance for Atomic Veterans, Citizen Soldier, Health and Energy Institute, Military Family Support Network, National Committee for Radiation Victims, Natural Rights Center, Nuclear Information and Resource Service, and Veterans Due Process, Inc., respectfully urge that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 24, 1992. The issues presented on review are timely,

substantial and of great significance to the amici organizations and to the parties and interests which they represent. The parties to the appeal have consented to this filing.

The rationale provided by the district court relied upon the important considerations which underlie the intent of Congress to remove veteran's claims from the Article III courts and to repose them in a system of the Executive Branch. Congress did not intend to remove attorneys from this process, but a century of inflation has accomplished that effect. A century of growing complexity, and increasingly insideous weaponry, capable of inflicting long-term latent injuries, has also created an Article II system in which an attorney is essential to marshall proof and to protect claimants from manifold abuses of the process.

INTEREST OF AMICI

Amici Curiae are eight independent, nonprofit, non-governmental, public interest organizations concerned with and affected by the due process and right to counsel issues raised in this case.

Alliance for Atomic Veterans is a national and international non-governmental association representing radiation-exposed veterans in six countries. Since 1983, the Alliance has served as an advocate for reform of national and international laws restricting the rights of radiation victims to fair compensation for their injuries. Alliance also works for an end to nuclear tests in order to prevent additional damage to future generations. The Alliance has U.S. offices at Box 32, Topock, AZ 86436.

Citizen Soldier is a public advocacy project of Alternatives to Militarism, Inc., a non-profit charity. Citizen Soldier works for the rights of active duty GIs and veterans on issues related to service connected injuries and health problems. Citizen Soldier has, since 1969, provided counseling and assistance to thousands of military veterans in claims before the Veterans Administration and has argued for remedial legislation in Congress. The staff of Citizen Soldier brought national attention to the atomic veteran dilemma with the publication of

the book, *GI Guinea Pigs* in 1980. Citizen Soldier is located at 175 Fifth Ave., New York, NY 10010.

Health and Energy Institute is a public interest research and educational organization, bringing together scientists, educators, policymakers, and citizens to examine and formulate improvements to public policies with respect to ionizing radiation and other environmental dangers. Health and Energy Institute is located at P.O. Box 5357 Takoma Park, MD 20912.

Military Family Support Network represents the interests of active duty GIs and veterans on issues related to injuries and health problems stemming from service in the Persian Gulf during Operations Desert Shield and Desert Storm. The Network successfully urged President George Bush to create a national registry for the some 4,000 veterans suffering from Gulf War Syndrome. The Network provides counseling and assistance to veterans bringing VA claims. The Military Family Support Network is located at PO Box 2047, Buies Creek, NC 27506.

National Committee for Radiation Victims is a congress of representatives of national and international radiation victims and survivors groups and professionals concerned about the health effects of radiation and the rights of victims to receive meaningful relief. Since 1985, NCRV has provided the public education foundation for reform of the VA compensation and pension program and has contributed to the creation of a federal compensation program for Utah downwinders, Navajo uranium miners, and nuclear test site workers. NCRV is located at 6935 Laurel Ave., Takoma Park, MD 20912.

Natural Rights Center is a public interest law project with offices at 556 Farm Road, Summertown TN, 38483. The Center provides representation to a number of veterans in Agent Orange, ionizing radiation and other complex claims before the Veterans Administration regional offices, the Board of Veterans Appeals, the Court of Veterans Appeals and other

adjudicatory bodies.[1] The Center brought the first successful claim for service connection related to Agent Orange exposure and has provided free attorney representation for more atomic veterans than any other public interest law project. The Center also actively represents the interests of its members in governmental actions having significant constitutional and human rights implications.

Nuclear Information and Resource Service is a non-profit educational organization focusing on nuclear power and energy alternatives, nuclear waste, radiation and health. NIRS comprises a coalition of individuals and local action organizations concerned about our nation's environmental future. NIRS is located at 1424 16th St., Washington DC 20036.

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[1] The Center presently represents one radiation claimant whose decedent initiated his first VA claim for injuries secondary to radiation exposure in 1947. This claim has been in active, attorney-represented litigation before the VA since 1980, and has involved well in excess of 2,800 hours of attorney and expert time for work which has included military archival research, plutonium bone and tissue assay, two independent dose reconstructions, Freedom of Information Act requests, petitions to revise VA regulations, testimony to scientific review boards, and multiple hearings at all levels of the VA process before reaching its present stance of a Court-ordered stay before the Court of Veterans Appeals. In a second case by way of example, the Center represents an Air National Guardsman exposed during Operation Plumbbob in 1957. This claim has been in active, attorney-represented litigation before the VA since 1979, and has involved well in excess of 2,200 hours of attorney and expert time for work which has included military archival research, epidemiological study by the National Centers for Disease Control and Prevention, one official and two independent dose reconstructions, two dose reconciliations by outside consultants to the Department of Veterans Affairs, testimony to scientific review boards, and multiple hearings at all levels of the VA process before reaching its present stance of submission to the Board of Veterans Appeals in October, 1991. The extensive attorney assistance provided in these and many other exceedingly complex claims was provided free of charge to the claimants and paid for by donations to the Center from concerned individuals and charitable foundations as well as the donated time of several attorneys, student interns and paralegal professionals.

Veterans Due Process, Inc. is a non-profit veterans' rights organization based at P.O. Box 68237, Portland, OR 97268. For the past decade, VDP has attempted to halt the erosion of veterans rights to fair access to medical care and disability compensation. Since the passage of the Econo..y Act in 1933, 28 U.S.C. § 211a, service-connected tort claims have been the sole province of the VA system. VDP has historically served as a bulwark to insure that the VA system is kept fair and that administrative decisions are ultimately and effectively subject to review by a fair and impartial judiciary.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SIGNIFICANT MISCONSTRUCTION OF THE DECISION OF THIS COURT WHICH, IF SUSTAINED, WILL IMPOSE FAR-REACHING LIMITATIONS UPON THE RIGHTS OF VETERANS TO RECEIVE FAIR AND MEANINGFUL ADJUDICATION OF BENEFIT CLAIMS

When the Cold War ended, there were no ticker-tape parades in the cities of America. Still, the heroes of America's longest war knew who they were. They were the tank commanders in West Germany, the watchtower sentries in South Korea, and the airmen in missile silos in Wyoming. If Purple Hearts had been awarded to all the wounded, the single largest group would have been the 233,000 servicemen whose bodies were wounded by atomic radiation: the men and women who put their bodies on the line in the defense of freedom through credible nuclear deterrence.

All those wounded men and women have ever asked in return is for fair and equal treatment with their compatriots who have borne wounds in service to their country. Because their claims are at the very frontier of science, however, such compensation is seldom forthcoming. The appellant class members in this case argue that the $10.00 fee limit, as applied to Service Connected Death and Disability ("SCDD") claimants whose claims are based on exposure to ionizing radiation and who are not covered by the Veterans' Judicial Review Act of 1988, violates due process and the First Amendment because it deprives claimants of a meaningful opportunity to present their

claims to the Veterans Administration ("VA") and to petition the government.

After considering the merits of this claim, the district court held that the $10.00 fee limitation on attorneys' fees imposed by 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905) is unconstitutional as applied to claims for benefits based on exposure to ionizing radiation. *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392 (N.D. Cal. 1992).[2]

The rationale provided by the district court was founded upon a number of considerations. Ionizing radiation ("IR") claimants are generally poor, and in the cases of veterans themselves, almost always in poor health. *Id.*, (in petitioners' Appendix to the Petition for Certiorari at 115, herein "a-115"). Moreover, veterans' law encompasses an extraordinarily complex body of statutes, regulations, and other materials. (*Id.* at a-115-116). The competent use of these materials is a high-skilled task. (*Id.* at a-116). For IR claims in particular, the claim development process is far more detailed and complex than that for other SCDD claims. (*Id.* at a-117, a-120-122). The typical medical issues are far more complex than the average claimant, having less than a high school education, is generally capable of understanding, not to mention developing. (*Id.* at a-119).[3]

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[2] In *National Ass'n of Radiation Survivors v. Walters*, 473 U.S. 305, 105 S.Ct. 1380, 87 L.Ed.2d 220 (1985) (*"NARS I"*), this Court declined the opportunity to reach a decision as to whether applicants for SCDD benefits possessed a protected property interest in those benefits. In the absence of that guidance, it is now assumed in many jurisdictions that an applicant for disability benefits has a property interest in those benefits. *See, e.g.: Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). The district court below concluded that these appellants, *as applicants*, possess a property interest protected by the Constitution. *National Ass'n of Radiation Survivors v. Walters*, 589 F.Supp. 1302 at 1313-14 (N.D. Cal. 1984); *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392 (N.D. Cal. 1992).

[3] Said the district court:

continued...

The record indicates that the factual development of IR claims conducted by VA regional offices is extremely limited. An abstract of a random selection of 674 IR claims files introduced at trial indicates that no dose estimate was obtained by the VA regional office in fifty-nine percent of IR cases and that no physical exam was conducted in forty-eight percent of the claims. (Ex. 461). In 509 of these cases the VA performed no independent factual development due to the complicated nature of IR claims and to the fact that the VA's "work product" schedule does not provide additional work credits for IR claims. (Ex. 458). Thus, as the district court found, there is an institutionalized incentive to underprepare the IR claims. (a-132).

Recent decisions of the Court of Veterans' Appeals ("CVA") in cases involving complex claims[4] illustrate that the problems the district court identified remain evident, even after the enactment of the Veterans' Judicial Review Act of 1988 ("VJRA"), Pub.L.No. 100-687, 102 Stat. 4105 (1988). These

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"In light of the complexity of the medical issues involved, disagreement in the medical field with regard to cancer causation issues and the health

Note 3, continued...

> effects of low level exposure to ionizing radiation, the difficulty of disease classification and of discerning disease manifestation periods, and conflicting evidence regarding the validity of radioepidemiological tables employed by the VA and of other epidemiological data available in the field, the court finds that proper presentation and adjudication of IR claims will often require the marshalling of expert medical opinion and testimony."

National Ass'n of Radiation Survivors v. Derwinski, at a-122-123.

> "The court further finds, based on the evidence demonstrating the complexity of radiation dose reconstruction and the disagreements in the field concerning the validity of film badge data and the development and application of dose reconstruction methodology, that adequate presentation and adjudication of IR claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated."

Id. at a-128.

[4] Cases involving, for example, claims based on exposure to ionizing radiation, exposure to Agent Orange, and post traumatic stress disorders.

decisions underscore the importance of counsel at the early stages of the VA claims process.

The CVA frequently has found, for instance, that the VA failed to perform its statutory duty of assisting unrepresented veterans.[5] If veterans were allowed to retain counsel, they would not have to rely for support on an institution with a proven record of failing to assist them in developing the facts pertinent to their claims. Developing the factual basis for claims earlier in the process would likely result in those claims being addressed on their merits sooner and reduce the number of appeals taken. The VA adjudication system today, much as when this case was tried in 1988, frequently denies veterans with complex claims their procedural and substantive rights.

Recent CVA decisions also reflect that the Board often ignores controlling statutes and its own regulations.[6] Even when following regulations, the Board often bases its decisions on its own unsubstantiated conclusions rather than

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[5] *See, e.g.: DiBenedetto v. Brown*, 4 Vet. App. ___, 1993 Vet App. LEXIS 404 (July 13, 1993); *King v. Brown*, 4 Vet. App. 519 (1993); *Ascherl v. Brown*, 4 Vet. App. 371 (1993); *Booth v. Brown*, 4 Vet. App. 280 (1993); *Culver v. Derwinski*, 3 Vet. App. 292 (1992); *Trytek v. Derwinski*, 3 Vet. App. 153 (1992); *Schfrath v. Derwinski*, 1 Vet. App. 589 (1991); *Ashmore v. Derwinski*, 1 Vet. App. 580 (1991); *Sagainza v. Derwinski*, 1 Vet. App. 575 (1991); *Parker v. Derwinski*, 1 Vet. App. 522 (1991); *White v. Derwinski*, 1 Vet. App. 519 (1991); *Hanson v. Derwinski*, 1 Vet. App. 512 (1991); *Godwin v. Derwinski*, 1 Vet. App. 419 (1991); *Travelstead v. Derwinski*, 1 Vet. App. 344 (1991); *Karnas v. Derwinski*, 1 Vet. App. 308 (1991); *Morris v. Derwinski*, 1 Vet. App. 260 (1991); *Hyder v. Derwinski*, 1 Vet. App. 221 (1991); *Wood v. Derwinski*, 1 Vet. App. 190 (1991); *Corchado v. Derwinski*, 1 Vet. App. 160 (1991); *Myers v. Derwinski*, 1 Vet. App. 127 (1990); *Green v. Derwinski*, 1 Vet. App. 121 (1990); *Akles v. Derwinski*, 1 Vet. App. 118 (1991); *Littke v. Derwinski*, 1 Vet. App. 90 (1990); *Murphy v. Derwinski*, 1 Vet. App. 78 (1990); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); *Jolley v. Derwinski*, 1 Vet. App. 37 (1990).

[6] *See, e.g.: Servello v. Derwinski*, 3 Vet. App. 196 (1992); *Cosman v. Principi*, 3 Vet. App. 503 (1992); *Hohol v. Derwinski*, 2 Vet. App. 169 (1992); *Douglas v. Derwinski*, 2 Vet. App. 103 (1992); *Sawyer v. Derwinski*, 1 Vet. App. 103 (1991); *Fugere v. Derwinski*, 1 Vet. App. 103 (1990); *Bentley v. Derwinski*, 1 Vet. App. 28 (1990).

on the evidence before it.[7] In one IR claim, the Board discarded the standard of proof established by Congress for dismissing radiation claims—"no reasonable possibility" of service-connection—and inserted its own "absence of probability"—standard to make the burden more difficult for the claimant. *Sawyer v. Derwinski*, 1 Vet. App. 103 (1991). These problems would be alleviated to a great degree if attorneys were available earlier in the process to brief the often complex issues before the Board. Veterans raising complex claims *pro se*, generally without the benefit of legal training and almost invariably suffering from debilitating diseases, are left without guidance when the Board disregards the law. Often such veterans are incognizant of their legal position; rarely are they able to prepare the legal arguments necessary to persuade the Board to follow the law or to challenge the lack of evidentiary basis for Board decisions.

When this Court last examined the veterans' appeals process, it found that the process was "designed to function throughout with a high degree of informality and solicitude for the claimant." *NARS I, supra*. The number of cases now being disposed of by the Board and the CVA on procedural and jurisdictional grounds belies this conclusion.[8] The VA

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[7] *See, e.g.: Romeo v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 338 (August 6, 1993); *Mee v. Brown*, 4 Vet. App. 220 (1993); *Cosman v. Principi*, 3 Vet. App. 503 (1992); *Cleary v. Principi*, 3 Vet. App. 495 (1992); *Hatlestad v. Derwinski*, 3 Vet. App. 213 (1992); *Williams v. Brown*, 4 Vet. App. 270 (1993); *Watson v. Brown*, 4 Vet. App. 189 (1993); *Stein v. Derwinski*, 2 Vet. App. 517 (1992); *Philbrickv. Derwinski*, 2 Vet. App. 466 (1992); *Fisher v. Derwinski*, 2 Vet. App. 406 (1992); *Murincsak v. Derwinski*, 2 Vet. App. 363 (1992); *Sheed v. Derwinski*, 2 Vet. App. 255 (1992); *Crandall v. Derwinski*, 2 Vet. App. 113 (1992); *Cousino v. Derwinski*, 1 Vet. App. 536 (1991); *Colvin V. Derwinski*, 1 Vet. App. 171 (1991); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

[8] The effect of not having attorneys to guide claimants through the often arcane casuisteries of the IR claims process is clear from the number of cases reaching appellate courts with insufficient development or attention to procedural and jurisdictional prerequisites. *See, e.g.: Waddell v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 457 (September 7, 1993); *Ephraim v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 465 (September 16, 1993); *Abernathy v. Principi*, 3 Vet. App. 461 (1992);

appears to be relying increasingly on formality as a tool to manage its growing appellate caseload. So, for instance, a 100-percent service-connected psychiatrically disabled veteran—with diminished mental capacity to deal with matters pertinent to his claim—had his appeal dismissed because a VA official assisting the claim missed a filing deadline. *Roy v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 506 (September 24, 1993). This is not an isolated incident. Claimants now more than ever require attorneys to guide them through the legal obstacles posed by increasingtly complicated VA regulations and CVA decisions.

Contrary to the pre-trial supposition of this Court in *NARS I*, the just cited cases, as well as the two month trial before the district court, demonstrated that the mass of claims processed by the Veterans Administration *does* incorporate high probability of error. *NARS v. Derwinski* at a-134; *and see:* Abrams, Complex Statutory Scheme Creates Heartache and Heartbreak for Radiation Claimants, *The Veterans Advocate*, 4:8:61-66 (April, 1993).

In light of the complex medical and scientific issues involved, the difficulty of obtaining appropriate records, and the limited ability of a lay-claimant or service representative to comprehend the relevant issues, the trial court found that the right to retain counsel was the only means available to provide claimants effective representation.

The government argued before this Court in 1984 that the non-adversarial adjudication system serves to safeguard claimants' interests. Instead, the district court found that the VA's adjudication of IR claims is more accurately characterized as adversarial.[9]

Drenkhahn v. Derwinski, 2 Vet. App. 207 (1992); *DiDonato v. Derwinski*, 2 Vet. App. 42 (1992); *Sudranski v. Derwinski*, 1 Vet. App. 457 (1991); *Magula v. Derwinski*, 1 Vet. App. 76 (1990); *Strott v. Derwinski*, 1 Vet. App. 114 (1991); *Doub v. Derwinski*, 1 Vet. App. 17 (1990); *Skinner v. Derwinski*, 1 Vet. App. 2 (1990).

[9] Said the district court:

"The record is replete with examples of the VA's lack of solicitude for IR claims and agency behavior that demonstrates a disregard for the procedural

There is no safety in assuming that charitable services can fill the void and provide any better representation. As the district court observed,

> While service representatives undoubtedly are well-intentioned, their "crushing" caseloads make effective representation of claimants with complicated IR claims virtually impossible. Ex. 70. For example, the Disabled American Veterans employed ten appeals-level service representatives who handled 17,954 claims in Fiscal Year 1986; the two representatives of the AmVets presented 1304 claims to the BVA the same year. RT at 1780-82, Ex. 263.
>
> Training of service representatives is very limited, and they receive no specialized training in the intricacies of IR claims. RT at 1174-75,1177. As a result, service representatives often do not detect errors in VA denials of IR claims. RT at 11 78-83.

Note 9 continued...
and substantive rights of IR claimants. *See, e.g.*, RT at 1086-94. For example, there is evidence that the VA actively discourages IR claimants from invoking their right to a hearing where they could more fully present their claims, provide expert medical and scientific testimony and respond to rating board concerns. Ex. 18 at 11,17 at 137-39,1042. Personal hearings are held in only 5.69% of IR claims. In less than one percent of the cases are those hearings held prior to the VA's initial determination. RT at 250. IR claimants are discouraged from requesting hearings despite the fact that the evidence shows that those claimants who have hearings have a substantially higher success rate than those who do not. RT at 248-50.

"The record indicates that, either by design or neglect, the VA has operated in such a manner so as to frequently put the claimant at a disadvantage in the adjudication process. Materials important to development of an IR claim often are not made available at VA regional offices. RT at 258. The vast array of materials, General Counsel opinions, and other documentation relevant to IR claims are not indexed so as to make them accessible to a lay-claimant. *Id.* And pattern letters sent to the IR claimant solicit information adverse to the claim without requesting information tending to prove it."
Id. a-132-133.

In addition, the evidence shows that service representatives do little in the way of fact development for IR claims, instead relying almost exclusively on the claimant to marshal the complicated array of materials and information necessary to successfully present a claim. RT at 1107:23-1108:5,1704:22-1707:2,1712. For example, service representatives rarely obtain independent medical exams for claimants. RT at 1706. Worse yet, it appears that in most cases service representatives do not meet with the claimant before a rating decision is made. RT at 1708.

Service representatives rarely request a hearing for the claimant before the rating board and often discourage veterans from requesting a hearing prior to denial of the claim by the regional office. RT at 1150,1730, Ex. 236. The record suggests that in those instances where a service representative does obtain a hearing for the claimant and represents the claimant, the representative often does not perform effectively as an advocate. RT at 1149-50,1160-65,1736. Frequently, the representative meets with the claimant for the first time one hour prior to the hearing. RT at 1149.

The evidence also indicates that service representatives are not an effective safeguard in appeals of claim denials before the BVA. Service representatives frequently fail to notify claimants of their right to appeal, and as a result, claimants often fail to exhaust their administrative remedies. RT at 1714. Where the claimant is advised of his or her right to appeal, in most cases the claimant fills out the substantive appeal form without the assistance of the service representative. RT at 1159-60,1724. This occurs despite the fact that the claimant is deemed to accept any factual finding in the Statement of the Case not disputed in the substantive appeal form. Service representatives rarely request hearings on behalf of the IR claimant before the BVA. RT at 1733. Appeals briefs prepared by service representatives are often inadequate. RT at 1158.

In sum, the evidence strongly suggests that there is little difference in quality between claims prepared solely by the IR claimant and those prepared with the assistance of a

> service representative. RT at 1169. The deleterious effects of the service representatives' almost total reliance on the claimant is magnified by the fact that the average veteran claimant has only an eleventh grade education. Ex. 461.

a-134-135.

Based on the evidence presented at trial, the district court found unequivocally that attorneys would perform far better than volunteer service representatives in other areas which are key to proper presentation of an IR claim. (a-136). Indeed, IR claimants who have received the benefit of attorneys have had 2400% higher success rates than those have not.

This Court has previously recognized the possibility that the fee limitation might be found unconstitutional as it applied to "some discrete class of complex cases." *NARS I,* 473 U.S. at 337,105 S.Ct. at 3198. The cautious analysis of the district court's opinion amply demonstrates that, because of the extreme complexity of governing law, applicable procedures, medical and scientific issues, and necessary factual development, IR claims are exceptionally complex and are thus distinguishable from those of the typical VA benefits claimant.

This Court, in reversing the preliminary injunction, found that the rationale for the limitation was

> that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

Id. at 321, 105 S.Ct. at 3189. Fearing that "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible" and that the VA adjudication system would be "rendered more adversary and more complex by the very presence of lawyer representation," the Court accorded great weight to the government interest. *Id.* at 326, 105 S.Ct. at 3191.

Chief Justice Rehnquist's analysis implies that the real goal of the fee limitation was to prevent attorneys from participating in the adjudication of veterans' benefit claims, since only this would realize the governmental interest identified by the Court, i.e., preserving the "simple" nature of the procedures by keeping attorneys out. In fact, as Justice Stevens pointed out in his dissent in *NARS I*, the purpose of the fee limitation when enacted was not to prevent the employment of reputable counsel but instead to protect veterans from unscrupulous lawyers. 473 U.S. at 360, 105 S.Ct. at 3210 (Stevens, J., dissenting). A $10 fee in 1862, the year the fee limitation was enacted, was roughly equivalent to a $580 fee today. *Id.* at 361,10; S.Ct. at 3210. Thus, the fee limitation initially *allowed* for the employment of an attorney by a veteran claimant, while the fee limitation at present *does not.*

The handicap that the ongoing legal construction has provided is a legacy of waste and inefficient use of scarce judicial resources. Fully 65 percent of cases reaching the Court of Veterans Appeals are filed *pro se*, a situation which Chief Judge Frank Nebeker has termed "a serious problem which adversely affects this Court, the community of our nation's veterans, and the achievement of the goals which prompted the 100th Congress to institute judicial review of veterans' benefits decisions."[10] A similar problem has confronted the Board of Veterans Appeals, which will only issue some 27,600 decisions this year, down from 45,308 in 1991, despite a rise in the number of cases docketed. The average response time at the BVA has risen from 139 days in 1991, to 240 days in 1992, to 441 days in 1993, an escalating delay factor which the Secretary of Veterans Affairs ascribes to the increasing complexity of the "evolving body of case law" emanating from VJRA.[11] The Secretary's solution is to ask Congress for millions of additional tax dollars to help BVA deal with all of these *pro se* claimants. A simpler and more straightforward solution would be to permit these claimants to exercise their right to retain counsel.

---

[10] Letter, Frank Nebeker to Alan Cranston, October 23, 1991.

[11] Letter, Jesse Brown to Thomas S. Foley, August 13, 1993.

As Justice Stevens reminds us,

> "[T]he citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless. It should not be bargained away..."

a-89.

CONCLUSION

For the reasons described in the foregoing, the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing have been served upon Counsel for the Parties by first class mail, postage prepaid, this 14th day of October, 1993.

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No. 93-438

In The Supreme Court
of the
United States

October Term, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; JANET RENO, Attorney General of the United States,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amicus curiae, the Radiation Health Effects Public Interest Law Group (hereafter "RADLAW"), is a non-profit group founded to collect data and provide legal and other resources to radiation-exposed veterans and their families.[1] Much of RADLAW's work is necessary because Veteran's Administration claims are as factually and legally complex as the District Court found them to be in this action. RADLAW was founded to press for reform of the Department of Veteran's Affairs, to make it more responsive to radiation-exposed veterans and to develop education programs for those interested in understanding radiation health issues. RADLAW has worked closely with many members of the class of 10,000 ionizing radiation victims certified below. In the course of its work, RADLAW is conducting the nation's first morbidity studies of veterans exposed to ionizing radiation.

Trinity Post 7-45 is a nationwide non-profit organization of radiation-exposed veterans; it specializes in researching historical records of atmospheric nuclear weapons tests. The Colorado Agent Orange Nuclear Veterans Coalition is a non-profit group formed in 1983 to assist veterans exposed to toxic substances in obtaining benefits. There are currently about 300 veteran members of this group, most of whom have been exposed to Agent Orange or nuclear radiation.

The National Association of Atomic Veterans is a non-profit group established in 1979 to represent veterans exposed to radiation. Its membership consists of roughly 4,000 victims of radiation tests and radiation-related other service activities.

It has been the experience of all Amici that ionizing radiation claims are excessively complex for veterans, and that veterans need counsel to secure their property rights in the benefits for which they apply. Because of

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[1] All Amici received written consent from all parties of record to file this Brief, pursuant to Supreme Court Rule 37.2.

their experience in helping veterans secure these rights, Amici are uniquely qualified to explain why the District Court's findings of claims complexity and attorney value were correct, and why the Ninth Circuit Court of Appeals' failure to defer to those fact findings, and failure to follow this Court's earlier remand order, call for a writ of *certiorari*.

SUMMARY OF ARGUMENT

Ten thousand veterans were exposed to ionizing radiation during their occupation of Japan after World War II, or during their later participation in thermonuclear blast testing in the 1950's. These men continue to suffer radiogenic disease and death as a result. This is a Constitutional challenge to a Civil War-era statute preventing these veterans from retaining counsel to assist them in pursuing statutory benefits arising from their service-related injuries.[2]

Amici ask the Court to finish the task it began in *Walters* in which the Court held that an injunction against enforcement of the attorney limitation statute could be sustained upon a strong factual showing of the risk of claims benefit deprivation, combined with a showing that counsel would sharply reduce the risk of erroneous claims denial. On remand the District Court found all of this. The Ninth Circuit, however, did *not* follow this Court's remand directive in *Walters*, and reversed the District Court, upon an inappropriate *de novo* review of the District Court's findings of fact. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583 (9th Cir. 1993) (hereafter the "*NARS Appeal*"). This Court should not hesitate to grant *certiorari* when the Court of Appeals has flouted the Court's earlier remand order.

The federal issue here is overwhelming. Ten thousand veterans are barred from seeking benefits through a mechanism the District Court found was unconstitutional. This brief focuses upon the factual, scientific, medical and legal complexity facing ionizing radiation claimants.

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2 38 U.S.C. § 5903(1) prohibits attorneys from charging or receiving any fee in veterans' claims. Section 5905 provides a penalty of one year's imprisonment for any attorney violating the fee prohibition. The intended -- and achieved -- effect is to remove counsel from the veterans' claim system.

I. *THE WRIT OF CERTIORARI MUST BE GRANTED TO ENFORCE THIS COURT'S REMAND ORDER IN WALTERS, AND TO REAFFIRM THE UNIVERSAL DEFERENCE GIVEN TO FINDINGS OF FACT BY A TRIAL COURT*

> Congress began providing veterans pensions in early 1789, and after every conflict in which the nation has been involved Congress has, in the words of Abraham Lincoln, 'provided for him who has borne the battle and his widow and his orphan.'

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 309 (1985) (hereafter "*Walters*").

The Court further noted that the veterans' claims process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Id.* at 311. With this stated faith in the Nation honoring debts to its veterans, this Court earlier struck down a global injunction barring enforcement of the attorney limitation statute, 38 U.S.C. § 5903(1) (*formerly codified at* 38 U.S.C. § 3403(c)). That ruling prevented veterans from retaining counsel to press complex claims for radiogenic disease arising from nuclear blast exposure, but Amici felt that if this Court's remand order in *Walters* were followed, the statute would inevitably be invalidated on an as-applied basis. The remand order in *Walters* allowed the as-applied challenge, dependent on a strong factual showing of the risk of deprivation of property rights and the benefits of counsel. Following this, the District Court found what Amici have learned through years of hard experience: ionizing radiation claims are far too complex for veterans to pursue without counsel. The Court of Appeal, though, ignored the District Court's fact findings and refused to follow the *Walters* remand. For the reasons set forth below, the Court should grant a writ of *certiorari* to review the Ninth Circuit's failure to follow *Walters*.

A. ***The Supreme Court Directive in Walters***

1. ***This Court Ordered Remand to Determine the Extent to Which the Denial of Counsel, and the Factual and Legal Complexity of Pressing Claims, Deprived Veterans of a Property Right Without Due Process***

When first considered by this Court, this action presented a facial challenge to the attorney limitation statute. In *Walters*, this Court followed the Due Process deprivation test announced in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), finding that the attorney limitation found in 38 U.S.C. § 3403 (now 38 U.S.C. § 5903) could not be facially enjoined on preliminary injunction. On remand, the District Court made detailed findings of fact concerning each of the Due Process standards articulated in *Matthews* and ordered by *Walters*: (1) the private interests affected; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; (3) the government's interest, including fiscal and administrative burdens of additional procedures. Amici here focus upon the second prong of that test.

The *Walters* Court held that an as-applied challenge could be upheld only upon an extraordinarily strong showing of probability of error in the claims process, combined with a showing that counsel would "sharply" diminish that probability. *Walters* at 326. On remand, Plaintiffs were also required to show that the attorney limitation posed "a risk of erroneous deprivation of rights in the generality of cases reached by the injunctive relief." *Id.* at 337 (O'Connor, J., concurring.)

Despite this difficult burden, Plaintiffs proved at trial the enormous factual, medical and scientific complexities of radiogenic disease pathology, and what the District Court found were the "byzantine" legal intricacies of pursuing ionizing radiation claims, as well as finding that attorneys improved a claimant's odds of recovering by a factor of 25. *National Ass'n of Radiation Survivors v.*

Derwinski, 782 F. Supp. 1392, 1395-1407 (N.D. Cal. 1992) (hereafter the "*NARS Facts*.")

B. ***Standards For Granting Certiorari***

Grant of *certiorari* is appropriate because the Ninth Circuit Court of Appeals decided a federal question in conflict with a controlling decision of this Court. Sup. Ct. R. 10.1(c); *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, --- U.S. ---, 112 S.Ct. 2019, 2023 (1992) ("we granted *certiorari* because of concern that the decision below was inconsistent with *Philadelphia v. New Jersey*" (citation omitted)); *Montro v. Pape*, 365 U.S. 167, 170 (1960) ("this case is here on a writ of *certiorari* which we granted because of a seeming conflict of [the appellate court's] ruling with our prior cases") (*overruled* on other grounds by *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978)).

This Court has frequently granted *certiorari* when a lower court decided a case inconsistently with the Court's earlier decisions in similar cases. *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987) (failure to follow earlier decision); *First Nat. Bank v. Cities Service Co.*, 391 U.S. 258, 259 (1987) ("[t]his Court granted *certiorari* to determine whether the decisions below were in conformity with *Poller v. Columbia Broadcasting System*" (citations omitted)); *Wilkinson v. United States*, 365 U.S. 399 (1961) ("[w]e granted *certiorari* to consider the petitioner's claim that the Court of Appeals had misconceived the meaning of the *Barenblatt* decision" (citation omitted)).

Amici do not simply claim that an appellate court has misapplied or misinterpreted this Court's decisions in similar cases. Nor is this petition based on the common assertion that the Court of Appeals has decided a case incorrectly. Rather, the Court of Appeals simply ignored this Court's remand directive in *Walters*. Grant of *certiorari* is therefore particularly appropriate. In *Lyng v. Payne*, 476 U.S. 926 (1986), for example, this Court had vacated a judgment and remanded with instructions to the appellate court to reconsider the case in light of a

particular case. *Id.* at 934. The appellate court in *Lyng* then "adhered to its prior views" and reinstated its decision. *Id.* This Court then granted *certiorari* to determine whether the appellate court properly followed the remand order. As in *Lyng*, the question is whether the appellate court here complied with this Court's remand order.

Accordingly, since the Court of Appeals' decision is not only at odds with this Court's applicable decisions, but more importantly is in direct conflict with this Court's remand order in *Walters*, the grant of *certiorari* is absolutely needed to preserve the authority of this Court.

C. *The Findings of the District Court on Remand Followed Exactly this Court's Directive in Walters*

On remand, the District Court conducted a lengthy trial, evaluating the demeanor of witnesses and reviewing thousands of pages of documents and deposition transcripts. Following the *Walters* remand directive to narrow the scope of the challenge to those claims which might be particularly complex, the District Court certified a sub-class of veteran victims of ionizing radiation. After exhaustive review of the evidence, the District Court found, as fact, that unrepresented veterans were not able effectively to sort through the complex factual, scientific, medical and legal issues in their claims without counsel, and that counsel would sharply decrease erroneous claim denial.

1. *Consistent with Walters, the District Court Evidence Showed Substantial Factual Complexities Facing Veterans Pressing Radiation Benefits Claims*

"[P]roperly developing the facts underlying these claims is an extremely intricate undertaking." *NARS Facts* at 1402. The District Court findings reflected what Amici have known for years: the true facts surrounding ionizing radiation claims are enormously complex, and in some cases have been actively concealed from claimants by their government.

Amici have found in working with unrepresented veterans that most are poorly equipped to understand the factual complexities of ionizing radiation claims. A typical handwritten claim from the files of Amicus RADLAW shows the level of sophistication with which unrepresented veterans typically approach these claims:

> I was one of (the personnel stationed at Camp Hanford) from 9/20/50 to 7/27/51. While I was their (*sic*) one day I saw a dead cat with yellow-green substance emanating from the cat's mouth. I told these (*sic*) to some VA doctor and one of them said that was radiation poisoning. So if that cat was dead from radiation poisoning what was it doing to me. And this is what has been happening to me in the last years. Saliva glands were enlarged in 1980. VA doctor removed one of the gland (*sic*). A year later doctor at VA found a tumor at the base of my throat. Three years I lost my other saliva gland at this time. I have been put on penicillin (*sic*) two times in the last (illegible) months (*sic*).

The veterans with whom Amici work are, as the District Court found, generally poor, and do not have the education or experience necessary adequately to pursue their benefits claims. On average, ionizing radiation claimants have not even completed high school. *NARS Facts* at 1406. Further, ionizing radiation claimants are "almost always in poor health." *Id.* at 1395.

As a result, veteran victims are not likely to have substantial resources to pursue lengthy challenges, or to pay for their medical care without benefits. Sixty-eight per cent of veteran victims of ionizing radiation have household incomes below $20,000 per year. *Id.* at 1396. At the same time, almost half of these veterans incur medical expenses of over $5,000 per year. *Id.* As a result, a "substantial majority" of claimants would rely on any benefits for "basic maintenance and support." *Id.*

The odds of an ionizing radiation-exposed veteran contracting a radiogenic disease amount to a national

tragedy. According to one follow-up study of causes of death among veterans of the CROSSROADS blast, conducted by Amicus National Association of Atomic Veterans, fully *78%* had died from lung cancer. Another study, reviewing causes of death of veterans of various atomic tests, showed that roughly *68%* died as a result of their service-related exposure to ionizing radiation.

When these unrepresented veterans have petitioned the government for redress, they have most often been told that their health problems could not have resulted from exposure. Only 250 out of 12,000 requests for monthly benefits based on radiogenic disease have been granted, amounting to a benefit granting rate of roughly *two* percent.

The sheer factual complexity of ionizing radiation claims makes it all but impossible for these poor, ill and uneducated veterans to secure their property rights without counsel. Applicable regulations found in the "M21-1" Adjudication Manual, for example, require a veteran to develop an almost encyclopedic concordance of information about nuclear blasts that occurred decades ago, including:

- The current diagnosis of the veteran's disease and, if known, the specific cell type and stage.

- The dates, places and circumstances of exposure to ionizing radiation, including the dates and place of test; operation by test shot code names; the number of tests witnessed; the organization or unit (ship, task group, company or squadron, etc.) and rank at the time of test; the duty, place and organization unit from which the veteran may have been detailed for participation; whether a film badge was issued and worn; and the names of other service personnel with the veteran at the time of participation.

- The veteran's history of exposure to known carcinogens.

- The history of members of the veteran's family who have been diagnosed as having cancer.

- A detailed description of activities during the entire period of participation, including: the distance of the veteran from the center of Ground Zero at the time of the explosion; at the time of each explosion, whether the veteran was in the open, under cover (building, closed vehicle, trench, and so forth), in a plane or aboard ship (on or below deck); whether the veteran moved to or toward Ground Zero after the explosion, how soon thereafter, and how close; and how long the veteran remained in the vicinity of the explosion, initially and after advancing.

Claims are granted only when the benefits director is "convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not" that the claim is meritorious. The benefits director is seldom convinced. Thus, one begins to understand why only two percent of the 12,000 radiation exposure compensation claims submitted to the Veterans Administration have been allowed.

It would be difficult enough for poor, uneducated and ill veterans to assemble all of these facts and marshal them in a way to beat the two percent odds, and convince the benefits director of a claim's merit. Sadly, veterans face problems going beyond scientific and medical complexities. Upon remand, the District Court saw evidence of shocking efforts by the government or its representatives to tamper with evidence. Because of page limitations, Amici here detail only one example.[3]

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[3] The District Court also found that the government engaged in wholesale shredding of relevant evidence in this litigation -- triggering substantial sanctions. *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987). The government does not appeal from that determination, so this final adjudication of destruction of evidence in a veterans claim case must be accepted as true.

Key to any veteran's claim for benefits is his ability to prove how close he was to a particular thermonuclear detonation. The relevant regulations require unrepresented veterans to prove adequate blast proximity to support an inference of radiogenic disease causation. The "dose reconstruction" for a veteran is thus absolutely key to whether he will receive benefits. *NARS Facts* at 1400. To show proximities, the government generated maps showing troop line locations at the time of a blast, and showing ground zero in relation to the troop line. Evidence at trial showed that *the "dose reconstruction" consultants retained by the government tampered with the blast maps, redrawing troop line movements, so that the resulting maps showed troops farther away from blasts than they actually were. These deceptive maps were then used to deny claims to unrepresented veterans.* A copy of such a map, showing the original and tampered troop lines, is appended to this brief as Appendix "A."

2. ***Consistent with Walters, the District Court Evidence Showed Substantial Medical Complexities Facing Veterans Pressing Radiation Benefits Claims***

The District Court found that "the medical issues present in [ionizing radiation] claims are far more complex than those in other [service connected disability or death] claims and that the average claimant is not capable of understanding the medical intricacies of an [ionizing radiation] claim." *NARS Facts* at 1398.

Extensive expert testimony was submitted showing the difficult medical issues involved in ionizing radiation claims, and how those complexities contribute to an unacceptable risk of error in the absence of retained counsel. *Id.* at 1398-99. These issues include the induction and etiology of cancer; use of medical tests and examinations; interpretation of epidemiological studies; use of radioepidemiological tables and probability analysis; dose-response curve models; manifestation determinations respecting radiogenic diseases; use of tissue samples and other clinical aspects; disease

definition or classification (*e.g.*, primary site of metastasis); latency periods; synergistic effects; and supervening causation. *Id.* at 1398. None of this evidence was before this Court in *Walters*, and was part of the factual record the *Walters* Court ordered to be prepared.

The government has also adopted an exclusive list of radiogenic diseases,[4] and has frequently argued that the high claims denial percentage flows from claims for non-listed diseases. This is really no defense. As trial testimony showed, there are many complex issues of interpretation and nomenclature of the radiogenic disease list. As a result, an unrepresented veteran who lists an incorrect name or condition may have his claim wrongfully eliminated at the screening stage. Additionally, there are complex issues of cancer site migration and whether the ionizing radiation regulations cover cancer which originated in a non-listed tissue and metastasized to a covered tissue, and vice versa.

3. *Consistent with Walters, the District Court Evidence Showed Substantial Scientific Complexities Facing Veterans Pressing Radiation Benefits Claims*

The District Court also made extensive findings of fact concerning the complexity of scientific issues in ionizing radiation claims, concluding that they are "beyond the capacity of a lay-claimant to understand." *NARS Facts* at 1399.

The District Court found substantial scientific complexities in dose reconstruction, due to flawed, sporadic and inaccurate use of film badges. *Id.* at 1400-01. The District Court also found serious factual

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[4] The applicable regulations recognize fifteen general disease types as radiogenic in origin: (1) leukemia, except chronic lymphatic leukemia; (2) thyroid cancer; (3) female breast cancer; (4) lung cancer; (5) bone cancer; (6) liver cancer; (7) skin cancer; (8) esophageal cancer; (9) stomach cancer; (10) colon cancer; (11) pancreatic cancer; (12) kidney cancer; (13) urinary bladder cancer; (14) salivary gland cancer; and (15) multiple myeloma. 38 C.F.R. § 3.31b(b)(2) (1992).

questions about radionuclides generated by nuclear devices; interpretation of radiation data readings; instrumentation problems; spread of environmental contamination; pathways of radiation exposure (whether external, internal or through absorption); monitoring equipment (*e.g.*, film badges); and approaches to scientific dose reconstructions. Dose reconstruction deficiencies in "official" dose estimates included use of inaccurate generic models, selective use of data, flawed input assumptions, and improper uncertainty analysis. The marked bias against ionizing radiation claimants further multiplies the risk of erroneous conclusions. *Id.*

4. *Consistent with Walters, the District Court Evidence Showed Substantial Legal Complexities Facing Veterans Pressing Radiation Benefits Claims*

The District Court considered voluminous evidence at trial showing the error at each stage of the adjudication process, all due to the legal complexity of the claims process. The District Court found the entire procedure was "byzantine." *NARS Facts* at 1403 n.9. Veterans must understand an "extensive body" of law (*id.* at 1396), including not only the applicable statutes, 38 U.S.C. sections 1-5000, but provisions of the Code of Federal Regulations, various undigested Veteran's Administration General Counsel opinions, decisions of the Board of Veterans' Appeals, and Veterans Administration circulars. *NARS Facts* at 1396.

Veterans must sort through a labyrinth of regulations to comply with filing deadlines.[6] The Veterans

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[6] Regulations regarding filing deadlines include: 38 C.F.R. § 20.302 (1993) (time limit for filing); *id.* § 20.303 (extension of time for filing); *id.* § 20.305 (computation of time limit); *id.* § 20.306 (legal holidays); *id.* § 20.400 (action by claimant or representative on notification of administrative appeal); *id.* § 20.401 (effect of decision on administrative or merged appeal on claimant's appellate rights); *id.* § 20.501(a) (notification of right to appeal in simultaneously contested claim); *id.* § 20.501(b) (time limits for filing substantive appeal in simultaneously contested claim); *id.* § 20.501(c) (time limit for filing supplemental statement of case in simultaneously contested claim); *id.* § 20.502 (time limit for response to notice of appeal by another

(continued...)

Administration is not required to notify claimants or their representatives of filing deadlines, and failure to meet deadlines can result in a claim's automatic dismissal.

In addition to the inherent complexity of the various sources of governing law, the more notable errors documented below were misapplications of regulations and standards, such as legal presumptions and the reasonable doubt standard; use of unpromulgated standards (*e.g.*, 5 rem minimum dose requirement for a medical opinion and the blanket denial of occupation force claims); screening errors involving the threshold criteria for ionizing radiation claims; and the failure to follow regulations regarding claim development, including medical examinations, opinions, records and dose reconstructions. *NARS Facts* at 1400-01.

The initial decision respecting a claim, or "rating decision," is made by a rating board. The rating board employs a complicated schedule for rating disabilities which prescribes specific percentages of disability for thousands of conditions. 38 C.F.R. § 4.1 *et seq.* (1992) Decisions of the rating agency "as to conclusions based on the evidence on file at [that] time" are "final and binding on all field offices of the Department of Veterans Affairs." *Id.* § 3.104(a).

The applicable regulations set forth three prerequisites that must be satisfied during initial review before the Veterans Administration will even pursue development of an ionizing radiation claim. First, the claimant must demonstrate that the veteran was "exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed." *Id.* § 3.311b(b)(1)(i). Second, the claimant must establish that the veteran "subsequently developed a radiogenic disease specified in paragraph (b)(2) of this

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[5](...continued)
contesting party in simultaneously contested claim); and *id.* § 20.503 (extension of time for filing in simultaneously contested claims).

section." *Id.* § 3.311b(b)(1)(ii). Third, the claimant must establish that the listed radiogenic disease was "manifested" -- an undefined term -- within specified periods. *Id.* § 3.11b(b)(1)(iii).

Regulations provide that if the rating board determines that any one of the three threshold requirements of subsection (b) is not satisfied it shall determine that a disease did not result from exposure to ionizing radiation. *Id.* In such cases, the claim can only be granted if it falls within a presumptive period (*e.g.*, *id.* § 3.307), or the veteran can show occurrence or manifestation in service. *Id.* § 3.311b(h).

The Veterans Administration regional office is authorized to develop facts concerning the claim only if these three conditions are met. The regulations contain no provision specifying what factual information should be furnished for the purpose of reconstructing the dose. The M21-1 Manual establishes an additional limitation; section 22.05.1(c)(1) requires development only where initial review has revealed "a reasonable probability of a valid claim."[6]

To challenge an adverse regional office decision, the claimant must file a Notice of Disagreement ("NOD") within one year from the mailing of the claims decision. 38 C.F.R. §§ 20.201 (1993) and 20.302(a) (1993). Upon receipt of the NOD, the Veterans Administration may either reconsider its decision or, if the decision is adverse to the claimant, proceed to prepare a Statement of the Case ("SOC"), which summarizes the decision, the factual record and applicable law, and constitutes the final decision of the regional office. The preparation of the SOC is the first stage in the adjudication process in which the Veterans Administration conducts a global review of the claims file. In the SOC, the Veterans Administration, not the claimant, frames the issues on

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[6] In effect, this provision confers absolute discretion upon the regional office to arrest development of an ionizing radiation claim at an early stage with no review. *See also* 38 C.F.R. § 3.326 (1992) (providing for physical examinations only where "reasonable probability of valid claim is indicated").

appeal. If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed.

The claimant may perfect an appeal by filing a "Substantive Appeal" within 60 days of mailing of the SOC (or the remainder of one year after the claims decision) (*id.* § 20.302(b)), which should "set out specific arguments relating to errors of fact or law." *Id.* § 20.202. The claimant is not presumed to agree with every statement of fact contained in the SOC to which an exception is taken in the Substantive Appeal. *Id.* Evidence at trial showed that over one-third of appeals instituted by NODs are never perfected.

The Board may dismiss any appeal which fails to allege specific error of fact or law. *Id.* If initial legal errors are made, the unrepresented veteran has no practical choice but to accept determination by the rating board. In one very recent example from the files of Amicus RADLAW, a claimant was denied benefits because the claimant's lung cancer did not cause greater than 10% disability *within one year of separation from service*. Of course, this is not a bar to claims, even under the restrictive regulations of the Veteran's Administration -- but without a lawyer, how is the disabled, impoverished and uneducated veteran to know the difference?

Although the government routinely points out these appellate procedures to show the fairness of the system, they amount to no more than a Due Process Potemkin Village. Though administrative appellate review exists on paper, the criminal prohibition against counsel forces veterans to navigate the appellate statutes and regulations alone.

5. *Consistent with Walters, the District Court Evidence Showed that Assistance of Counsel Would Sharply Increase a Veteran's Chances of Avoiding Improper Claim Denial*

The District Court found not only that the claims procedure is "complex" but found a "strong showing" that *because of that complexity* there was a "probability of erroneous denial" of ionizing radiation claims. *NARS Facts* at 1409. These findings reflect precisely the type of analysis ordered by the *Walters* Court. The law and procedures governing ionizing radiation claims were found to be a "complex web of government authority" that are "far more detailed and complex than that for other [service-connected death or disability claims]." *Id.* at 1396-97. The District Court found the medical and scientific issues to be beyond the understanding of claimants and that:

> adequate presentation and adjudication of [ionizing radiation] claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated.

Id. at 1402.

Trial evidence showed that attorney success rate on ionizing radiation claims was more than *25 times* higher than for those relying on service representatives, a statistically significant disparity. Attorneys are especially useful in obtaining documentary evidence necessary to support a claim. As the District Court found, evidence of bomb blast location must frequently be obtained through FOIA requests. *Id.* As demonstrated, *supra*, at p. 9, even if received, this information might well be altered by dose reconstruction consultants. Still further, much of the necessary information needs to be de-classified under the Secrecy Act, 50 U.S.C. § 401 -- which also requires assistance of counsel. *Id.* The District Court concluded:

> Given the tremendous diversity and complexity of the medical and scientific issues involved in [ionizing radiation] claims, it is not surprising that properly

> developing the facts underlying these claims is an extremely intricate undertaking. A plethora of information is useful in establishing pathways to which a veteran might have been exposed at the time of the nuclear explosion, and other factors which may have contributed to the claimant's health problems. Such information is essential to proving the level of radiation exposure, completing an individual dose reconstruction and demonstrating causation.

Id.

D. *The Ninth Circuit Failed to Give Proper Deference to the District Court's Findings of Fact*

In reversing, the Ninth Circuit failed to honor the fact findings of the District Court or to follow the *Walters* remand order. Federal Rules of Civil Procedure, Rule 52(a) is clear, and governed the Ninth Circuit's review of the District Court findings:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The District Court made the factual findings as to each of the factors in the *Mathews* balancing test, as ordered by *Walters*. These conclusions were pure findings of fact; however, to the extent the government suggests they comprised mixed questions of fact and law, they should nonetheless be afforded the same deference. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Ninth Circuit noted the "size and complexity of the record in this case and the fact-intensive nature of the district court's ruling." *NARS Appeal* at 587 n.6. Given the constitutional issues raised, however, the Ninth Circuit adopted a *de novo* review.

The Ninth Circuit never found that any of the District Court's fact findings were "clearly erroneous." Instead, it simply held that the fact findings did not exhibit due deference to Congress. *NARS Appeal* at 591. In other words, the District Court made extensive findings of fact showing an act of Congress was unconstitutional as applied to a particular class of veterans, and the Court of Appeals bypassed those findings by relying on observations of fact by the very Congress whose act was found unconstitutional. Through this circularity, *no* act of Congress could ever be found unconstitutional as applied, assuming Congress lards the Congressional Record with enough factual observations suggesting an act is constitutional.

The Court of Appeals relied solely upon *Walters* for this notion that District Court fact findings are irrelevant in the face of deference due to Congress. Of course, the Ninth Circuit misunderstood *Walters*: when this Court first saw this case, it was a fact-independent *facial* challenge, and deference to Congress was appropriate. However, the *Walters* Court expressly remanded the cause *for fact findings* on the as-applied challenge. This Court did not order an idle act; it intended that the District Court fact findings would be given weight.

II. ***CONCLUSION***

Based on its findings, the District Court held that the class of ionizing radiation victims made:

> an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility.

NARS Facts at 1409.

Ten thousand veterans have sacrificed their health and their lives in service to this nation. They ask for the right to choose whether to have assistance of counsel in pursuing enormously complex claims of delayed

manifestation radiogenic disease. Their Supreme Court held out a hope for these veterans in *Walters*, finding that an effective prohibition against counsel would be unconstitutional upon a showing of a risk of deprivation combined with a showing that counsel would sharply reduce that possibility. The District Court found everything required by *Walters*, but the Ninth Circuit took that assistance of counsel away by misunderstanding and ignoring this Court's ruling in *Walters*. The parties have argued the legal bases for *certiorari*; as Amici we go one step further. For their selfless dedication to the nation, for their sacrifices which helped defend the very Constitution whose protection they now seek, Amici urge that this Court owes these veterans one last chance to fulfill the promise made in *Walters*. *Certiorari* should be granted.

Dated: October 18, 1993

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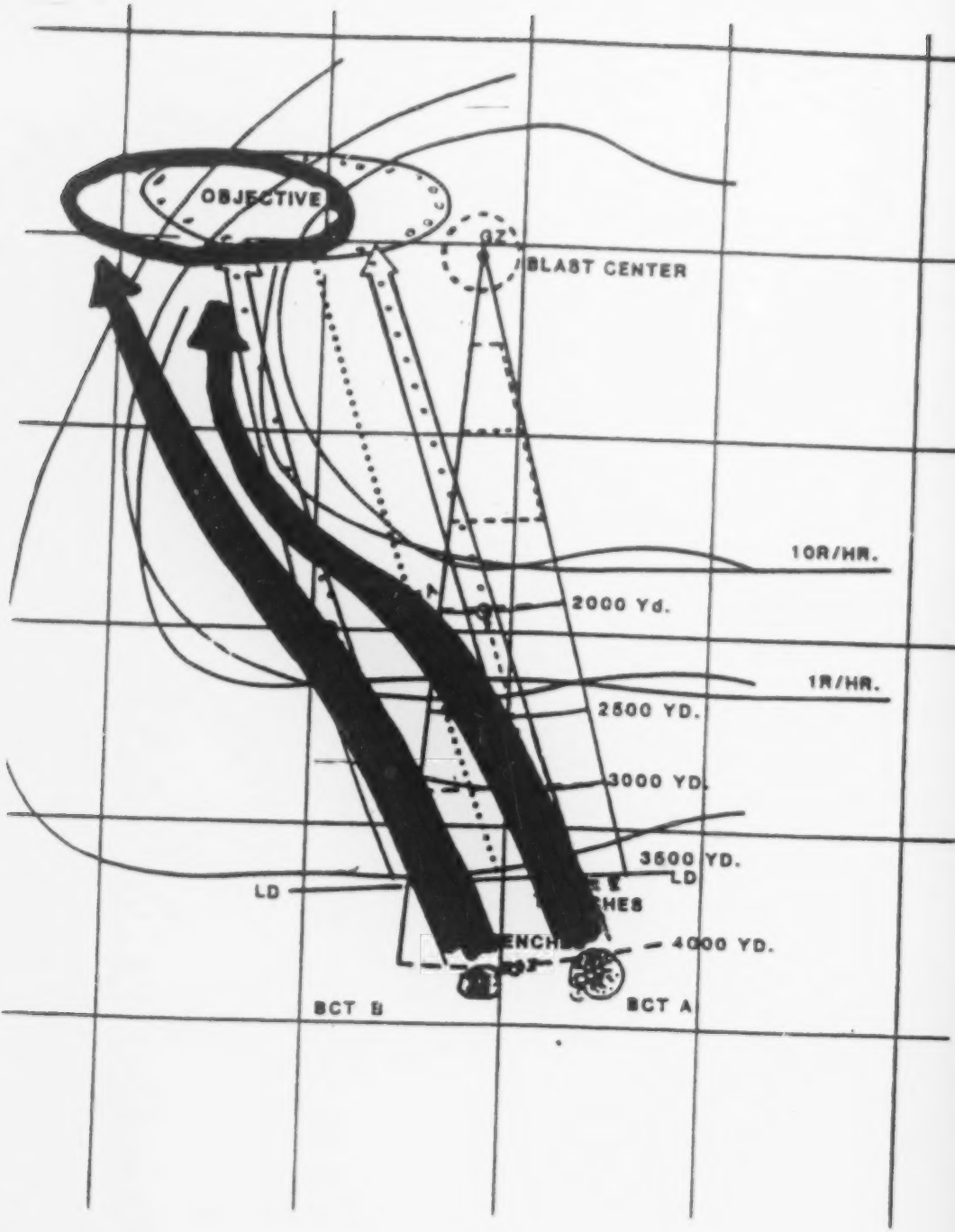
APPENDIX A

Appendix A is a copy of a map, introduced in evidence at trial, of the SHOT SIMON atmospheric test. The blast is shown as "GZ" ("Ground Zero"). Evidence at trial showed that the true location of troop line movements brought veterans to within yards of Ground Zero, as shown by the dotted lines. Dose reconstruction consultants employed by the government redrew the troop marching lines, as shown by the heavy black lines, so as to create an illusion that the veterans were much farther away from Ground Zero. This redrawn map was then used to deny claims to veterans.


OBJECTIVE
GZ
BLAST CENTER
10R/HR.
2000 Yd.
1R/HR.
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LD
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BCT B
BCT A

Supreme Court, U.S.
FILED
OCT 20 1993
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No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual; on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JESSE BROWN, Secretary for Veteran's Affairs; THE DEPARTMENT OF VETERAN'S AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Swords to Plowshares Veterans' Rights Organization ("Swords") is a small, non-profit veterans service organization located in San Francisco, California.[1] Swords has been officially accredited and recognized by the Veterans Administration ("VA") as a service organization. Swords has been handling VA disability claims since 1974. Typically, Swords assigns a staff attorney and/or paralegal to each claim. In 1992 Swords provided claims advice and representation to about 250 veterans and their families. In addition, Swords has provided counseling, employment, and other services to veterans; runs a veterans' outreach program; and coordinates and provides services to homeless veterans.[2] Swords charges neither fees nor costs for the work it performs to serve the veteran population.

SUMMARY OF ARGUMENT

Swords has a keen interest in the constitutional issues raised by Petitioners. Swords views the *NARS* case as a veterans' civil rights case. Swords believes that the elimination of the $10 fee limitation is essential if veterans are to obtain meaningful access to our system of justice. In particular, the fee limitation, and the slightly less onerous fee restrictions found in the Veterans' Judicial Review Act of 1988, deprive veterans of any meaningful opportunity to present their claims for veterans' benefits. The effects of the fee limitation are most pernicious with respect to complex SCDD claims like ionizing radiation, dioxin, and post-traumatic stress disorder claims.

Swords also believes that the notion that the $10 fee limitation can be justified by the paternalistic goal of preventing over-

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[1] Swords has received written consents from the parties to this action for its filing of an amicus brief; these consents are filed herewith.

[2] Swords was a plaintiff in the original *NARS* case when it was filed on May 13, 1983, but dropped out as a plaintiff when the complaint was amended in 1986 to assert claims on behalf of a class of ionizing radiation claimants.

reaching by unscrupulous lawyers is antiquated and inherently flawed. It is especially ironic that our nation's veterans are singled out for this disparate treatment while no other group or individual in our country is deprived of access to retained counsel. Indeed, indigent suspects in criminal cases are provided counsel at government expense. If veterans and other citizens are to maintain confidence in our system for the administration of justice, they must be convinced that the government's procedures are fair. Artificial barriers such as the $10 fee limitation prevent access to adjudication mechanisms and significantly undermine public confidence in our system of justice. Likewise, the threadbare rationale which the Ninth Circuit relied upon to justify the fee limitation only serves to cause veterans to question the integrity of judicial processes.

For these reasons, and those expressed below, Swords joins with Petitioners and other amici in urging the Supreme Court to accept certiorari in this case. Swords joins in the brief filed by Petitioners, but also wishes to highlight several issues for the Court.

ARGUMENT

I. LACK OF AVAILABILITY OF COUNSEL AND OTHER REPRESENTATION TO HANDLE IR CLAIMS

Although Swords is committed to providing free representation to the disabled veteran population, Swords has adopted a policy *not* to handle Ionizing Radiation ("IR") Claims, principally because Swords lacks the resources and expertise to retain the medical and scientific experts that are necessary to evaluate and prosecute IR Claims and appeals. Although we do not currently accept radiation claims, other service organizations routinely call us for a referral to an attorney when they receive an IR Claim. Based on our long experience in Northern California and familiarity with veterans' service organizations, we can say with confidence that the other service organizations located here, like the American Legion, are not pursuing IR Claims past the most superficial initial filings. Whatever the policy of the national service

organizations, their local service representatives, as a practical matter, lack the resources to handle IR Claims.

In our view, no veterans' service organizations in Northern California currently provide competent representation to veterans with IR Claims. Without attorney participation, there can be no process, let alone due process, for IR Claimants. The simple fact confronted by every IR Claimant is that access to an attorney is the only avenue open for the meaningful assertion of their rights. IR Claims are complex, because they involve a mix of legal theories rooted in several iterations of legislation, more or less conforming regulations from the VA, and more detailed provisions in VA manuals, circulars, and other authorities. The case law is rapidly changing. Even the best-prepared service representative is poorly equipped to utilize statutes and case law, or fashion arguments with the skill of an attorney. Indeed, as a rule, the veterans' service representatives neither read cases nor are trained to interpret them. They cannot "shepardize," prepare declarations, or handle expert witnesses. To deny veterans the right to an attorney is to deny them access to the skills required to win cases such as *Walls*, discussed below.

The complexity of an IR Claim makes it extremely costly to pursue. A skillfully fought IR Claim will absorb many hundreds of hours of personnel time for a service organization. The lay service officers, however, have extremely heavy case loads, which prevent them from devoting more than a few hours to each claim. In addition to time demands, the necessity for expert testimony, in most cases, would require the service organization to make a considerable out-of-pocket expenditure for expert services, an expenditure which is rarely authorized because of budgetary constraints.

By law, moreover, veterans' service organizations may not charge fees for the work they do on behalf of their clients. If they win a very large retroactive award in an IR Claim, the service organizations receives nothing. The extraordinary amount of work and the expenses in prosecuting an IR Claim are powerful disincentives for veterans' groups to take these cases: for the cost of a

single IR Claim, many other more garden-variety veterans' claims could be worked. From the perspective of a service organization, the concentration of scarce resources on a single complex IR Claim is irrational, because it limits service to many other veterans. Indeed, this is the reason why service organizations rarely take these cases, and why at least one other service organization—the American Legion—refuses to accept IR Claims. *See* Pl. Tr. Ex. 225.

In our experience, it is essential that a veteran have access to an attorney if she or he is to have a realistic prospect of prevailing in an IR Claim. This conclusion is reinforced by statistics showing that IR Claimants who are represented by attorneys are 24 times as likely to prevail as those who are not. Handling an IR Claim is a complex and costly process. A capable advocate must have a command of all the intricacies of evidence, discovery, and legal writing. Case outcomes often turn on the skillful employment of scientific and medical experts disputing arcane radioepidemiological issues. Attorneys, by their training, are equipped with the skills needed for effective advocacy in this difficult arena.

By contrast, the service officers provided by veterans' service organizations (e.g., the American Legion, Veterans of Foreign Wars, and Swords to Plowshares itself) are poorly equipped with the legal skills that are at a premium in complex cases. Attorneys are needed to meet the sophisticated defense that the VA ordinarily mounts in these high-stake claims with important political implications.

II. PROCEDURAL AND SUBSTANTIVE DIFFICULTIES INHERENT IN IR CLAIMS

The body of law governing IR Claims is complex. Prior to 1984, VA regulations generally applicable to SCDD required proof of service connection. Obviously, it was extremely difficult for claimants to prove causation between an IR exposure forty years ago and a current cancer. In 1984, Congress passed the Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984). The preamble to

this act expressly recognized that IR Claims present issues far more difficult than the average disability claim. Therefore, this act established that the VA should provide entitlement based on statistical associations between IR exposure and disease.

Pursuant to Public Law 98-542, two regulations now largely determine the outcome of IR Claims. 38 C.F.R. 3.311b(b)(2) contains a list of approved IR diseases that may be service-connected if the VA makes the factual finding that the service-connected exposure is at least as likely as not to have caused the diseases. Testimony establishing a reconstructed radiation dose is an obvious obstacle to success for this route. The other regulation, 38 C.F.R. 3.309(d), provides a different list of presumptively-covered diseases and a different standard of proof. Entitlement to compensation for an illness specified on this list is predicated on a factual finding that the veteran's listed condition is also coupled with a "radiation risk activity."

III. *WALLS v. BROWN*: A CASE OF MISSED OPPORTUNITIES ILLUSTRATES THE VALUE OF ATTORNEYS

A recent Court of Veterans Appeals ("CVA") case illustrates the value of attorney representation in IR Claims. In *Walls v. Brown*, 5 Vet. App. 45 (1993), the Court of Veterans Appeals faced the issue of the evidence necessary to establish "radiation risk activity." Mr. Walls died of an infection caused by lymphoma, which is a "malignant disorder" under 38 U.S.C. sec. 1112. The disease could be service-connected under 38 C.F.R. 3.309, if the veteran had engaged in "radiation risk activity." The court determined that the VA had a plausible basis for concluding that there was no radiation risk activity.

Mr. Walls was a truck driver in a unit stationed near Hiroshima immediately after the war. His wife reported that he had told her that he had driven a truck to Hiroshima for supplies. Unfortunately, Mr. Walls's military records, which would almost certainly have indicated the veteran's duty assignments, had been destroyed in a fire at the National Personnel Records Center in

1973. Lacking the service records, the VA asked the Defense Nuclear Agency to confirm the veteran's duty station. The Agency could confirm only that Mr. Walls's unit was based 35 miles from Hiroshima. Under the test in 38 C.F.R. 3.309(d)(4)(vi), Mr. Walls would need to have been within 10 miles of Hiroshima, on at least one occasion, in order to meet the "radiation risk activity" requirement. Since the unit was located 35 miles away, the VA determined that the radiation risk test was not met—and the court upheld the VA's ruling.

Mrs. Walls lost her appeal for widows' benefits. She was represented by a non-attorney practitioner with Disabled American Veterans (DAV) in Washington, D.C. Had the Walls case been handled by an attorney from the beginning, the factual development likely would have been more intensive. (Mrs. Walls apparently did not seek the DAV's help until years after her husband's death.) An attorney would almost certainly have secured a detailed declaration from Mr. Walls, before his death, covering every aspect of his military service. It also would be normal practice for an attorney to interview other members of his unit, and to use the FOIA to secure military records showing what the unit did and where it traveled. Many other avenues to uncover helpful facts could have been pursued by an attorney.

The DAV's brief also suggested a missed opportunity—Mrs. Walls might have been entitled under an alternative legal theory. The court noted that Mr. Walls was diagnosed with colon cancer—which is a radiogenic disease recognized under 38 C.F.R. 3.311b. Since the colon cancer was not listed as an official cause of death, and as Mrs. Walls's advocate failed to mention this theory until the appeal, the court reasoned that the VA had no duty to pursue the colon cancer as an IR Claim, because it was not "reasonably raised" by the record. *Walls*, 5 Vet. App. at 49–50.

An attorney, however, likely would have spotted this issue and researched the colon cancer claim. If medical facts or expert testimony could be found to tie the colon cancer to the cause of death, then the IR Claim could be established under section 3.311b. Alternatively, if the cancer began in the colon and metas-

tasized to another site, causing death, the colon cancer could be classified as a contributory cause of death, establishing service connection under 38 C.F.R. 3.311b(b)(2). These important issues were totally missed by the advocate representing the claimant until raised—too late—by the DAV advocate in his Court of Veterans Appeals Brief.

IV. THE FORUM PROVIDED BY THE COURT OF VETERANS APPEALS IS INADEQUATE TO ADDRESS THE NEEDS OF IR CLAIMANTS BECAUSE PAID ATTORNEY PARTICIPATION IS PROHIBITED UNTIL THERE IS A FINAL DECISION BY THE BOARD OF VETERANS APPEALS

Another issue implied by the *Walls* holding is the limited nature of the forum provided to IR Claimants by the Court of Veterans Appeals. The CVA does not currently provide an adequate forum for IR Claims. The CVA experience under the less restrictive VJRA regime illustrates the more severe problems endemic in the $10 fee limitation. Thus, the effective advocacy depends on eliminating the $10 fee limitation for the *NARS* class, which is not covered by the VJRA. Accordingly, the *NARS* class does not even have the benefits of the VJRA.

Paid attorney representation before the CVA is not permitted until there has been a "final decision" by the Board of Veterans Appeals. 38 U.S.C. sec. 7266, 38 U.S.C. sec. 5904. A practical and important consequence of the "final decision" rule is that it prohibits that attorney from shaping the record on which the court will base its decision. The CVA's jurisdiction is limited to a review of the record created before the agency. 38 U.S.C. sec. 7252(b). The agency record is complete when the "final decision" is rendered, and this is the point at which a paid attorney can first intervene. Hence, the attorney is not permitted to correct or supplement the record before the court.

In contrast, the VA is free to rely on its attorneys for advice at any level of the IR Claim process. If the VA needs attorney advice

on an IR Claim, it can draw advice either from the VA attorneys who work for the general counsel's office or from the attorneys at the Board of Veterans Appeals. Only the veteran is denied attorney access during the claim process.

Had Mr. and Mrs. Walls been able to hire an attorney at the beginning of the claim process, they might have obtained a different result. They would undoubtedly have entered the CVA forum with a well-documented record, complete with expert diagnosis supporting the colon cancer issue and declarations from Mr. Walls and his fellow veterans supporting his contention that he visited Hiroshima.

Mrs. Walls's experience, though not unusual, highlights the due process travesty that all IR Claimants confront when challenging a VA ruling. They are laymen challenging a complex and professionally-organized government bureaucracy. The record of medical and legal evidence is almost entirely shaped by the VA. Only overworked and under-financed laypersons from the service organizations are permitted to represent the veteran until it is too late to affect the record upon which the CVA will rule. Only then, when the entire record of the medical evidence has been determined, is the veteran permitted to retain a lawyer for the CVA appeal.

But the right to a lawyer—under the constraints imposed by the CVA legislation—and the availability of lawyers are separate matters. Few lawyers have been attracted to CVA work—the restrictions are too onerous. Thus, 75% of the claimants at the Court of Veterans Appeals are *pro se*. The Swords staff attorneys know of only one private attorney in California who regularly practices before the Court of Veterans Appeals.

IR Claims are preeminently factual battles over medical judgments, dose estimates, exposure levels, and weapon yields. None of these factual issues can be raised at the CVA unless the veteran can meet the difficult test of proving that the VA's determination was "clearly erroneous." The CVA is an inadequate forum for IR appeals.

CONCLUSION

The $10 fee limitation, which continues to apply to thousands of VA claims, notwithstanding its repeal, prevents attorneys from intervening when they can do the most good for the client and the least harm to the VA. By acting early, attorneys can discourage clients with poor cases from pursuing a long and expensive crusade through the VA appeals process. Attorneys can help clients with good cases organize their evidence for effective presentation to the VA for early entitlement. Considerations of efficiency, constitutional due process, and simple fairness demand that veterans have the same rights to counsel as any other civil litigants in the United States of America.

Respectfully submitted,

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v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, with respect to claims for veterans' benefits based on exposure to ionizing radiation, the court of appeals properly rejected petitioners' constitutional challenges to a statute that, prior to 1988, limited the amount a claimant may pay a lawyer to $10.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-438

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., PETITIONERS

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 994 F.2d 583. The opinion of the district court (Pet. App. A110-A147) is reported at 782 F. Supp. 1392. A prior opinion of this Court in this case (Pet. App. A24-A89) is reported at 473 U.S. 305.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. A petition for rehearing was denied on June 18, 1993. Pet. App. A148-A149. The petition for a writ of certiorari was filed on September

16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has provided for the payment of benefits to veterans or their survivors for service-connected death or disability (SCDD). See 38 U.S.C. 1101 *et seq.* (Supp. IV 1992), and 1301 *et seq.* (Supp. IV 1992). As a general matter, a person initiates an SCDD claim by submitting a claim form to the Department of Veterans Affairs (DVA). 38 C.F.R. 3.151, 3.152. The claim form is reviewed by a three-person "rating board" from the relevant DVA regional office. See *id.* § 3.103. The rating board determines the extent (if any) of the veteran's disability and whether that disability is service-connected. The rating board is required to "assist a claimant in developing the facts pertinent to [his] claim," and to consider any evidence "offered by the claimant." *Id.* §§ 3.103(a), 3.103(d). A claimant is "entitled to a hearing at any time on any issue involved in a claim." *Id.* § 3.103(c). Proceedings before the rating board "are ex parte in nature"—*i.e.*, no government official appears in opposition to the claimant. *Id.* § 3.103(a). The board must resolve all reasonable doubts in the claimant's favor. *Id.* § 3.102.

The rating board is required to notify the claimant of its ruling. 38 C.F.R. 3.103(b)(1), 19.25. The claimant may then appeal to the local agency by filing a "notice of disagreement" within one year of the rating board's decision. *Id.* §§ 19.25, 20.302. If the agency again denies the claim, it must provide the claimant with a "statement of the case," which summarizes the facts and applicable law upon which

the rating board based its decision. *Id.* § 19.29. The claimant may appeal an adverse decision to the Board of Veterans Appeals (BVA). *Id.* § 20.202. BVA hearings are subject to the same rules as local agency hearings—they are *ex parte*, there is no formal questioning or cross-examination, and no formal rules of evidence apply. *Id.* §§ 20.700-20.701.

Pursuant to the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), claimants who filed a notice of disagreement on or after November 18, 1988, may appeal BVA decisions to the Court of Veterans Appeals (CVA), and then (in some cases) to the Court of Appeals for the Federal Circuit. *Id.* §§ 301(a), 402, 102 Stat. 4113, 4122, codified, as amended, at 38 U.S.C. 7251 *et seq.* (Supp. IV 1992). Claimants such as the members of the class in this case, who did not file a notice of disagreement on or after November 18, 1988, may not appeal the BVA's decision. *Ibid.*

Veterans' organizations make available trained service representatives throughout the claims process to assist claimants in developing and presenting their claims. See Pet. App. A10, A29. The service representatives' important role in the process is contemplated by statute. See 38 U.S.C. 5902 (Supp. IV 1992). Because Congress designed the SCDD administrative claims process to be informal and nonadversary, it originally limited to $10 the amount of fees that claimants could pay an attorney to help process an SCDD claim. 38 U.S.C. 3404, 3405 (1982). Congress revisited the issue in 1988 when it passed the VJRA, and decided to prohibit the payment of attorney's fees for all administrative proceedings through the BVA's initial determination concerning

whether an SCDD claim should be paid. Pub. L. No. 100-687, § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(c) and (d) (Supp. IV 1992). For proceedings that follow the BVA's initial determination of a claim, the VJRA relaxes the fee limit so that any fee paid to an attorney "may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim." *Id.* § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(d)(1) (Supp. IV 1992). Moreover, the BVA may reduce the fee if it is "excessive or unreasonable." *Id.* § 104(a), 102 Stat. 4108, codified, as amended, at 38 U.S.C. 5904(c)(2) (Supp. IV 1992). Those changes apply only to SCDD claimants who filed a notice of disagreement on or after November 18, 1988, and therefore do not apply to the claimants in this case. *Id.* § 403, 102 Stat. 4122, codified at 38 U.S.C. 3404 note.

2. This case concerns veterans who have filed SCDD claims with the DVA based on exposure to ionizing radiation (IR claims). The process for adjudicating IR claims is identical to that for other SCDD claims, except that Congress and the Veterans' Administration have provided detailed guidance regarding IR claims. In the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984), Congress directed the DVA to establish "guidelines," "standards," and "criteria" for the purpose of achieving simplicity, consistency, and fairness in the resolution of IR claims. *Id.* § 5(a)(1), 98 Stat. 2727. Congress also directed the DVA to consult with an advisory panel of medical and scientific experts, and to decide which diseases can be caused by exposure to

radiation. *Id.* §§ 5(b)(2)(A)(i), 5(b)(2)(B), 98 Stat. 2728.[1] Congress made the DVA's decision of which diseases can be caused by exposure to radiation, as well as all the DVA's regulations in this area, subject to notice and comment rulemaking. *Id.* § 5(c)(1), 98 Stat. 2729.

To discharge those statutory responsibilities, the DVA issued regulations that provide further guidance to local DVA officials in handling IR claims. The regulations direct local DVA officials to investigate an IR claim if the claimant alleges (1) to have been exposed to ionizing radiation through participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, or other specified activities; (2) to have subsequently developed one of 17 radiogenic diseases; and (3) to have developed one of those diseases within a specified period of time. 38 C.F.R. 3.311b. If an IR claimant satisfies those criteria, the regulations require the DVA to investigate the IR claim by gathering factual information and requesting an estimate from the Defense Nuclear Agency of the radiation dose to which the veteran would have been exposed. *Id.* § 3.311b(a)(2). The rating board at the local regional office then decides whether the claim is meritorious. *Id.* § 3.103.

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[1] Congress also directed the DVA to decide on standard periods in which diseases must become manifest in order for claimants to qualify for IR benefits. Pub. L. No. 98-542, § 5(b)(3)(A), 98 Stat. 2728-2729. In addition, Congress directed the Defense Nuclear Agency to issue uniform guidelines for determining the level of radiation doses to which servicemen were most likely exposed in their careers, which relates to whether an injury was service-connected. *Id.* § 7(a), 98 Stat. 2730.

Congress has enacted two other statutes concerning IR claims. The Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485, creates a presumption that 13 diseases are service-connected if they become manifest within 30 years (or more, with respect to most diseases) of exposure to radiation. See Pet. App. A4. The Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), as amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 3139(c), 104 Stat. 1835-1836 (1990), provides for one-time payments of $75,000 to persons who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and satisfy certain other criteria. See 42 U.S.C. 2210 note (Supp. III 1991); Pet. App. A4.

3. This action, a challenge to the constitutionality of the $10 fee limit, was filed in 1983 by two veterans' organizations and four individuals. In 1984, the district court issued a preliminary injunction barring the DVA from enforcing the $10 limit. *National Ass'n of Radiation Survivors* v. *Walters*, 589 F. Supp. 1302 (N.D. Cal.). This Court reversed on direct appeal, holding the fee limit constitutional on its face with respect to SCDD claims generally. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (reproduced at Pet. App. A24-A89).

This Court held that the government's interest in enforcing the fee limit—allowing the administrative system for awarding SCDD benefits to operate informally, so that claimants will not have to divide their awards with lawyers—is entitled to "great weight." Pet. App. A38, A43. "There can be little

doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it," the Court held, because "the claimant would * * * end up paying part of the award * * * to an attorney," and because "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible." *Id.* at A40, A43.

Given the weight of the DVA's interest in enforcing the fee limit, the Court held that "it would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." Pet. App. A43. The plaintiffs had failed to meet this "difficult" burden, *id.* at A48, because they did not prove "even approximately how often procedural or substantive complexities arise in the run-of-the-mine case, or even in the unusual case," *id.* at A45. Such proof is indispensable because "a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Id.* at A47-A48; *id.* at A53-A54 (O'Connor & Blackmun, JJ., concurring).

The Court further held the private interest at stake to be of diminished constitutional significance since SCDD benefits are not awarded based on need. See Pet. App. A50. The Court held that this factor was "determinative" of the right to employ counsel in this context for the same reasons that an evidentiary hearing is not required prior to a temporary deprivation of social security benefits. See *Mathews* v. *Eldridge*, 424 U.S. 319, 342-343 (1976).

The Court rejected petitioners' First Amendment claims because they "are really inseparable from their due process claims." Pet. App. A52. The Court emphasized that both claims center on "whether the process allows a claimant to make a meaningful presentation." *Ibid.*

Finally, the Court left open whether, on remand, an "as-applied" challenge to the fee limit could be sustained on behalf of individuals or identifiable groups. Pet. App. A52-A55 (O'Connor & Blackmun, JJ., concurring).

4. On remand, petitioners amended their complaint to challenge the constitutionality of the $10 fee limit as applied to persons with IR claims. The district court initially certified "a class consisting of 'all past, present and future ionizing radiation claimants who have, or will have, some form of "active" claim relating to SCDD benefits before the VA.'" Pet. App. A111. The certified class later was limited to claimants who filed notices of disagreement with decisions of a DVA rating board before November 18, 1988, and hence were not eligible to pay counsel more than $10 or to appeal their cases to the new Court of Veterans Appeals or the Federal Circuit. C.A. Excerpts of Record 70. The class also was limited to claimants who had not qualified for lump-sum payments of $75,000 under the Radiation Exposure Compensation Act or presumptively qualified for benefits under the Radiation-Exposed Veterans Compensation Act of 1988. *Ibid.*

The district court held that the $10 fee limit that applied to members of the class (as so confined) was unconstitutional. The district court concluded that the private interest in IR claims is "great" because

"a substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support." Pet. App. A115, A138. The court also held that the risk of an erroneous deprivation of that interest is high because "the complexities and uncertainties in IR cases are even greater than most of the difficult toxic tort cases." *Id.* at A138. The court noted that this Court had concluded that the public interest in the fee limit was significant, but said that "[r]egardless of the merit of the Court's analysis at the time, subsequent developments have robbed it of all validity." *Id.* at A140. In that respect, the district court cited the VJRA, in which Congress removed, post-1988, the $10 fee limit for proceedings following the denial of a claim by the BVA, even though Congress prohibited the payment of attorney's fees, post-1988, for claims that are resolved up to that point. *Id.* at A141. On those bases, the district court held that the fee limit violates the First Amendment as well as the Due Process Clause. *Id.* at A147.

5. The court of appeals reversed. Pet. App. A1-A23. It held that the district court had misunderstood the significance of the VJRA because that Act, by retaining a fee limit for administrative proceedings within the VA system up to the initial decision issued by the BVA, "reaffirmed the government's interest in the fee limitation." *Id.* at A9. The court of appeals also held that the district court had overestimated the strength of the private interest in IR claims because "non-need based benefits do not create as strong an interest as need-based benefits." *Id.* at A12-A13, citing *Mathews* v. *Eldridge*, 424 U.S. at 342-343.

In addition, the court of appeals held that the district court was mistaken in its assessment of the risk of erroneous denial of claims because it focused solely on the alleged complexity of the administrative process for IR claims rather than on whether the process "has produced or is substantially likely to produce a significant number of wrongful denials of claims." Pet. App. A15. The district court also erred in this regard, the court of appeals concluded, by focusing on whether lawyers are better able than non-lawyers to present IR claims in the DVA's administrative system, rather than on "whether lawyers are necessary to make the process fair." *Ibid.*

Finally, the court of appeals held that the district court erred by concluding that the fee limit violates petitioners' First Amendment right to petition for redress of grievances. Relying on *Walters*, the court of appeals concluded that "the focus of the First Amendment analysis is essentially the same as that under the Due Process Clause." Pet. App. A22.

ARGUMENT

The court of appeals correctly applied *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), to the IR claims presented on remand. Its decision does not conflict with the decision of any other court of appeals and does not present any question of broad legal significance. To the contrary, the dispute at issue involves a unique administrative claims scheme that was changed significantly in 1988. Moreover, Congress has taken steps to ensure that servicemen injured by exposure to radiation are adequately compensated. Further review is not warranted to determine whether the pre-1988 scheme was

constitutionally infirm with respect to claims based on exposure to ionizing radiation.[2]

1. Petitioners first argue that the court of appeals misread *Walters*. Pet. 18-20. More specifically, petitioners contend that the court of appeals ignored the district court's factual findings concerning the alleged complexity of the IR claims process and the need for lawyers because the court of appeals read *Walters* as holding that the IR claims process is not complex and that lawyers are not necessary to make that process fair. *Ibid.*

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[2] There is no basis in fact for petitioners' statement that "[i]f the Court of Appeals' decision is permitted to stand, a group of more than 10,000 disabled veterans and their families will be denied an opportunity to seek veterans' benefits with the aid of counsel." Pet. 17. On June 22, 1992, in compliance with the district court's decision on remand, the DVA mailed letters to 15,417 putative class members advising them that they might be eligible to have their IR claims readjudicated with the assistance of paid counsel. During the next 13 months, 4,856 IR claimants requested the DVA to determine whether they were eligible for readjudication with paid counsel, and the DVA determined that 2,743 of those claimants were eligible. Only 576 persons actually requested readjudication of their IR claims with the assistance of paid counsel, however, before the DVA suspended readjudication of IR claims in light of the court of appeals' decision. Of course, the persons who are actually affected by the decision here are the subset of those persons who would both request readjudication and then obtain benefits. In assessing the likelihood that members of that subset would obtain benefits, it should be kept in mind that they previously were denied benefits and that they have not qualified for the $75,000 lump-sum payment authorized by the Radiation Exposure Compensation Act or established eligibility under the presumption set out in the Radiation-Exposed Veterans Compensation Act of 1988. See C.A. Excerpts of Record 70 (limiting class).

Petitioners misread the court of appeals' decision. The court of appeals acknowledged that *Walters* "left open the possibility of a constitutional attack on the fee limit as applied to particular classes of veterans." Pet. App. A2. The court of appeals simply held that the evidence on which petitioners rely in advancing such an attack with respect to IR claims does not meet the "extraordinarily strong" standard set forth in *Walters*. See *id.* at A43. For example, the court of appeals correctly held that, under *Walters*, proof that the IR claims process is complex is not in itself sufficient to establish a due process violation. *Id.* at A17. That is true because proof of complexity alone does not establish "how frequently IR claims wrongly are denied" as a result. *Id.* at A18. As *Walters* held, without proof of how often alleged complexities are likely to produce erroneous denials of claims, see *id.* at A45, it is impossible to determine whether the IR claims process is "sufficient for a large majority" of those claims, *id.* at A47; see also *id.* at A37-A38.

Similarly, the court of appeals correctly noted that it is not enough to show that "IR claims present many tasks for which attorneys particularly are well suited," Pet. App. A20, or, as the Court expressed it in *Walters*, that lawyers "could provide more services than claimants presently receive," *id.* at A47. Here, as in *Walters*, plaintiffs failed to show how often IR claims turn on questions of law rather than fact, *id.* at A46, or why "*lawyers* must be available to identify possible errors in *medical* judgment," *id.* at A47. Accord *Washington* v. *Harper*, 494 U.S. 210, 236 (1990) (due process does not require presence of counsel in civil proceedings to authorize medical treat-

ment for mentally ill prisoners).[3] In fact, the evidence at trial demonstrated that factual issues predominate: between 70% and 75% of all IR claims are denied because the claimant did not claim to have a disease that the DVA has decided, by notice and comment rulemaking, can be caused by radiation exposure. See Gov't C.A. Rep. Br. 17 & n.3; cf. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 226-229 (1991).

2. Petitioners also contend that the court of appeals erred by improperly modifying the due process test set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Specifically, petitioners contend (Pet. 21-25) that the court of appeals required proof of actual error in the existing IR claims process and proof that lawyers are absolutely necessary, contrary to what *Mathews* requires.

Those arguments are without merit. As an initial matter, the court of appeals did not require proof of actual error in the IR claims process. Rather, as noted above, the court of appeals merely held that the district court made the same error on remand that it made in 1984: it failed to determine how often the alleged complexities in the claims process would likely cause a claim to be wrongly denied. Compare Pet. App. A14-A18 (court of appeals' opinion) with *id.*

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[3] Since "a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them," Pet. App. A47-A48 (*Walters*), petitioners are wrong to argue (Pet. 20) that the court of appeals erred by failing to address the claims of individual petitioners such as Reason Warehime. Purely anecdotal evidence is not adequate to establish a due process violation, especially on a class-wide basis.

at A44-A48 (*Walters*). As this Court held in *Walters*, one way to establish a sufficient likelihood of wrongful denials—but not the only way—is to show that a significant number of claims have been wrongly denied. *Id.* at A44. *Walters* held that petitioners had adduced no such evidence at that stage of the litigation. *Ibid.* The court of appeals merely held that petitioners were again unable to adduce such evidence on remand, and thus failed to succeed in this method of proving that the fee limit is unreasonable. *Id.* at A14-A18.

Moreover, petitioners err in arguing (Pet. 22) that the frequency of the likelihood that IR claims will be wrongly denied without paid counsel is irrelevant to the due process analysis. As noted above, this Court in *Walters* held that petitioners cannot prove that the fee limit violates due process without establishing how often the absence of lawyers is likely to cause an erroneous deprivation of an IR claim under the existing process. Pet. App. A43-A48. "[A] process must be judged by the generality of cases to which it applies." *Id.* at A47; see *id.* at A53-54 (O'Connor & Blackmun, JJ., concurring).

Likewise, the court of appeals did not err in considering the probable value of attorneys in preventing erroneous denials of IR claims under the current administrative system. Under *Walters*, the relevant issue is whether "the right to retain and compensate an attorney in [IR] cases is a necessary element of procedural fairness under the Fifth Amendment." Pet. App. A49. The court of appeals held that the petitioners failed to meet this standard because they established only that "IR claims present many tasks for which attorneys particularly are well suited." *Id.*

at A20. The court of appeals was right to so rule, because *Walters* held that such evidence does not establish that the right to retain and pay counsel is necessary to render an administrative claims process fair. *Id.* at A47-A49.

The court of appeals also correctly held that petitioners did not prove their case by relying on statistical evidence of an alleged disparity in the success rates of IR claimants who hired counsel and those who did not. Pet. App. A20-A21. The evidence on which petitioners relied revealed that IR claims handled by lawyers were granted in 5 of 31 (16%) cases, whereas IR claims not handled by lawyers were granted in 35 of 5,456 (0.6%) cases. *Id.* at A20; see Pet. 23. The court of appeals held that this evidence did not provide the "extraordinarily strong" proof of the need for paid counsel in IR claims that is necessary under *Walters* (see Pet. App. A43), because petitioners adduced no evidence concerning the strength of the claims studied. See *id.* at A20-A21. Without such evidence, it is impossible to know whether the IR claims handled by lawyers were granted more frequently because lawyers are generally necessary, or because those claims were stronger. The latter conclusion seems more likely, since service representatives generally provide assistance to any claimant without regard to the likelihood of success. See *id.* at A29. Lawyers, in contrast, would most likely not assist persons (such as the 70% of IR claimants who did not have a disease that can be caused by radiation exposure, see Gov't C.A. Rep. Br. 17 & n.3) with very little chance of qualifying for benefits.

3. Petitioners also argue that the court of appeals erred by relying on legislative history rather than on the district court's findings of fact concerning the procedural complexities of the IR claims process. Pet. 25-27. That argument furnishes no basis for further review for several reasons.

First, the court of appeals' main reason for rejecting petitioners' reliance on the alleged procedural complexities of the IR claims process was that petitioners failed to prove how often those alleged complexities are likely to cause the erroneous denial of an IR claim. See Pet. App. A15-A18. The court of appeals cited the legislative history of the VJRA only to confirm its conclusions about the lack of proof in this context. *Ibid.*

Second, the court of appeals was correct to take the legislative history of the VJRA into account. As this Court held in *Walters*, "[w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Pet. App. A48 n.12; see also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 572, 579 (1990). The Senate and House Committee Reports concerning prior versions of the VJRA specifically found that the existing SCDD claims process operates fairly without the need for paid counsel. For example, the Senate Committee Report stated:

> [T]he existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure,

> with the VA generally securing the relevant military records as well as evaluating the merits of the claim. * * * [T]here would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application.

S. Rep. No. 418, 100th Cong., 2d Sess. 63 (1988). See also H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 13-14 (1988). Likewise, the House and Senate Committees also reaffirmed the effective role that service representatives play in helping veterans to file claims with the DVA. See Pet. App. A19 (quoting committee reports).

Petitioners also contend (Pet. 26) that the court of appeals erred by overlooking Section 2(12) of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, which states that IR claims "present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service." 98 Stat. 2726. That finding, however, does not establish that Congress thought the IR claims process would be unfair without paid counsel, especially given that Congress specifically decided to retain the fee limit in the VJRA for initial DVA administrative proceedings. Thus, Congress responded to the differences between IR claims and other SCDD claims not by revoking the fee limit, but rather by requiring the DVA to provide additional guidance to its claims officers who investigate and rule upon IR claims. It also directed the DVA to issue detailed regulations governing IR claims and established statutory presumptions to aid IR claimants.

Petitioners also note (Pet. 27) that individual Members of Congress have criticized the DVA fee limit. The statements of individual Members, however, are an unreliable basis on which to discern congressional intent, particularly where, as here, the relevant statutes and committee reports show that Congress was satisfied with the fee limit and specifically decided to retain it in large part. See *Bath Iron Works Corp.* v. *Director, OWCP*, 113 S. Ct. 692, 700 (1993). Moreover, as would be expected, individual Members of Congress also spoke in favor of the fee limit. For example, Senator Cranston, who introduced the Senate's version of the VJRA, stated that "[t]he compromise agreement before us today prohibits attorneys fees until after the BVA makes its first final decision, thus contemplating that the current practice of veterans being assisted by skilled veterans' service officers throughout the VA and initial BVA administrative processes would continue to operate exactly as it does now." 134 Cong. Rec. 31,469 (1988). Senator Cranston's statement serves to confirm that Congress retained the fee limit in the VJRA for initial DVA administrative proceedings in order to prevent lawyers from turning that system into the formal, adversarial system that petitioners would prefer.

4. This Court in *Walters* rejected petitioners' First Amendment arguments at that stage of the litigation because those claims, "at base, are really inseparable from their due process claims." Pet. App. A52. In the Court's view, petitioners' due process and First Amendment arguments "focused on substantially the same question"—"whether the process allows a claimant to make a meaningful presentation"

of an SCDD claim to the government. *Ibid.* Because petitioners had not proved that the presence of paid lawyers is necessary to make a meaningful presentation of an SCDD claim, the Court held that their First Amendment claim fell short of the mark. *Ibid.*

The same disposition of petitioners' First Amendment claims is appropriate at this stage of the litigation. For the reasons stated above, petitioners failed to prove that paid lawyers are necessary to make a meaningful presentation of IR claims. Since petitioners' First Amendment claims on remand are based on "substantially the same" question as their due process claims, the court of appeals correctly rejected their First Amendment claims. Pet. App. A22-A23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
DEC 3 1993
OFFICE OF THE CLERK

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed on page ii of the Petition.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

When this Court remanded in 1985, five Justices agreed that the Court had left open a constitutional challenge to the $10 attorneys' fee limitation as applied to complex claims for veterans' benefits. Following that remand, the parties pursued discovery, and the District Court conducted a two-month trial of the constitutionality of the fee limitation as applied to a class of veterans or their beneficiaries presenting the most complex claims: those arising from exposure to ionizing radiation from atomic bomb testing and atomic bombs dropped on Hiroshima and Nagasaki ("IR Claimants").

Based on the scientific, medical, and documentary evidence presented at trial, the District Court made extensive factual findings describing the operation of the VA claims process as applied to a class of IR Claimants. These findings, distilled from tens of thousands of pages of expert and lay testimony and voluminous trial exhibits, themselves fill over twenty-two pages in the Appendix. (App. 115–37.) These findings detail a claims process of bewildering complexity, fraught with procedural pitfalls and riddled with errors. The District Court accordingly found that the $10 fee limitation, which effectively denies IR Claimants access to attorneys, violates procedural due process and First Amendment rights.

The Ninth Circuit reversed not because it found these findings to be clearly erroneous. Instead, the Ninth Circuit simply ignored the findings, and rested its decision on a stilted view of this Court's prior decision and unreliable indicia of congressional intent. Moreover, the Ninth Circuit created a heightened test for due process violations that deviates from the standard established by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and later cases. As shown in the Petition, these errors are of constitutional significance warranting this Court's intervention. If anything, the government's opposition confirms that, if left to stand, the Ninth Circuit's opinion will create an impossible standard for future due process claimants.

1. While paying lip service to the *Mathews* test, the government's brief demonstrates the breadth of its transformation in this case. For example, the government insists that the Ninth Circuit adhered to *Mathews*'s "risk of erroneous denial" standard, and did not require proof of actual error. According to the government, the Ninth Circuit "merely held" that the district court had failed to determine "how often" the "alleged complexities" in the claims process "would likely cause a claim to be wrongly denied." (Opp. 13.) The government is wrong.

First of all, the government's gloss on the Ninth Circuit's opinion itself rests on a showing of actual error. Any attempt to quantify "how often" the current system "likely" results in a meritorious claim being "wrongly denied" must start with

the identification of actual errors through an examination of individual claims. Only by identifying actual errors on a claim-by-claim basis can the likelihood of their occurrence system-wide be quantified.[1] Thus, notwithstanding the government's attempt at benign characterization, proof of actual error, as opposed to a risk of erroneous denial, forms the basis of the Ninth Circuit's due process analysis.

In addition, the government mischaracterizes petitioners' evidence and the District Court's findings as being limited to the complexity of the IR Claims process. (Opp. at 12.) The District Court found much more than abstract complexity. To cite but a few examples of the numerous shortcomings in the IR Claims processing system documented in the District Court's findings: the VA adjudication system is neither informal nor non-adversarial, as the government claims (App. 130–31); despite the *ex parte* and professedly solicitous nature of the system, the VA "actively discourages" IR Claimants from invoking their right to hearings, which are held in fewer than 6% of the IR Claims (App. 132); the VA performs no independent factual development in the vast majority of IR Claims, resulting in failure to obtain radiation dose estimates or physical exams in 59% and 48% of the claims, respectively (App. 131); the presumptions of service connection set forth in the regulations and touted by the government are in practice "illusory" (App. 129); and the lay service representatives who figure so prominently in the government's defense of the current system are not trained to handle IR Claims and are

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[1] According to the government, proof of error on an individual basis "is not adequate to establish a due process violation, especially on a class-wide basis." (Opp. at 13 n.3.) Carried to its logical conclusion, that argument would require reversal of *Mathews* and its long line of progeny, including *Parham v. J.R.*, 442 U.S. 584 (1979), and *Walters* itself, all of which recognized that due process violations may be established by proof of error on an individual basis. (*See* App. 55.)

consequently of little assistance to IR Claimants. (App. 133–35.)[2]

Indeed, the extent of the Ninth Circuit's transformation of *Mathews* is illustrated by its rejection of the exact type of evidence contemplated by this Court in *Walters*—statistically significant showing of error on a class-wide basis. The District Court found that IR Claimants with counsel were 2400% more likely to prevail than IR Claimants proceeding without counsel. In response, the government speculates, citing only its brief on appeal, that IR Claimants with counsel prevailed because they had stronger cases than unrepresented claimants. (Opp. at 15.) Of course, the government made no such showing below. Nor could such a showing be made without examining the merits of the claims of the unrepresented claimants, once again substituting a showing of actual error for the risk of erroneous deprivation.[3]

Nor did the Ninth Circuit's reformulation of *Mathews* end there. According to the Ninth Circuit, IR Claimants could make out a due process challenge only by showing that

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[2] The government also asserts, without support in the record, that "between 70% and 75% of all IR claims are denied because the claimant did not claim to have a disease that the DVA [Department of Veteran's Affairs] has decided ... can be caused by radiation exposure." (Opp. at 13.) That dubious proposition assumes that unrepresented claimants, proceeding without agency assistance, appreciate the intricacies of medical and scientific issues relating to disease causation. For example, a claimant with multiple cancers, only some of which are covered by DVA regulations, might not list them all on the claim form, thus leading to an erroneous denial. The government also erroneously assumes that claims officers always order medical records and never err during initial claims screening. Moreover, the government overlooks the provision of the DVA Adjudication Procedures Manual M21-1 (Trial Ex. 456) that requires development of a claim only where initial review has revealed a "reasonable probability of a valid claim." In effect, this provision gives the regional office absolute discretion to arrest development of an IR Claim with no further review.

[3] The government belatedly suggests that showing the merits of the underlying IR Claims would not be "the only way" for petitioners to prevail. (Opp. at 14.) Despite this argument, the government fails to suggest any alternative method.

lawyers are strictly "necessary to make the process fair." (Opp. at 10.) Through this sleight of hand, the Court of Appeals was able to reconcile the District Court's findings regarding the undisputed value of legal representation to IR Claimants with its own determination on appeal that denying IR Claimants access to lawyers was consistent with the minimum requirements of due process. The government in turn embraces this standard in defending the fee limitation, even though *Mathews* requires a showing of the probable value, rather than the strict necessity, of additional process. This Court should grant certiorari if for no other reason than to review the propriety of this unprecedented and virtually insurmountable standard for procedural due process.

2. The government asserts that enactment of the Veteran's Judicial Review Act ("VJRA") in 1988 has alleviated the due process issues identified by petitioners. (Opp. at 10–11.) To the contrary, experience under the VJRA reinforces the grave difficulties facing SCDD claimants who proceed without counsel. [4]

Recent decisions by the Court of Veterans Appeals demonstrate the widespread and persistent nature of the procedural deficiencies in the DVA claims process. Passage of the VJRA has not resulted in reformation of DVA procedures. The DVA continues to fail to seek important medical records in processing veterans' claims at the regional level. *See, e.g., DiBenedetto v. Brown*, 1993 U.S. Vet. App. LEXIS 404 (July 7, 1993). The DVA likewise continues to ignore its own regulations and continues to substitute its own unsubstantiated lay opinions "for independent medical

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[4] Furthermore, the government overlooks the changes to DVA regulations since this Court decided *Walters*. These changes have made the SCDD claims process more, rather than less, formal and adversarial. For example, the regulation directing the Board of Veterans' Appeals to give liberal construction to claims has been modified to add a clause stating, "but the Board may dismiss any appeal which fails to allege specific error of fact or law." 38 C.F.R. § 19.123.

evidence" in assessing disability claims. *See, e.g., Cosman v. Principi*, 3 Vet. App. 503 (1992).[5]

While the VJRA permits claimants to hire lawyers on appeal from adverse claims determinations, even that right is denied IR Claimants. Once again, experience under the VJRA shows that claimants need lawyers or other specially trained representatives to present a claim.

Chief Judge Frank Q. Nebeker of the Court of Veterans Appeals has characterized the numbers of veterans proceeding *pro se* as "a serious problem which adversely affects this Court, the community of our nation's veterans, and the achievement of the goals which prompted the 100th Congress to institute judicial review of veterans' benefit decisions." (Letter from Chief Judge Nebeker to Sen. Alan Cranston of 10/23/91 at 1.) Chief Judge Nebeker continued by stating that his court was concerned that

> two-thirds of the veterans who seek judicial review enter an arena controlled by statutory enactments, regulatory provisions, and legal precedents without the assistance of competent, experienced, and trained representatives.

Chief Judge Nebeker identified three "broad categories of potential resources" who could assist veterans: "(1) private practitioners and law students serving pro bono;" "(2) government attorneys ... desiring exposure to and experience in appellate litigation;" and (3) veterans service organizations. (Nebeker letter at 2–3.) Chief Judge Nebeker requested funding for a training program devoted to representing veterans with SCDD claims. (*Id.* at 3.) Congress responded by passing Public Law No. 102-229, which transferred part of the court's appropriation to the Legal Services Corporation to begin the proposed training program.

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[5] These cases are not aberrations. As discussed by amici, there are numerous other cases where the Court of Veterans Appeals has reversed because the DVA failed in its duty to assist the veteran, or misapplied controlling statutes and regulations. (*See* Brief of Amici Curiae Alliance for Atomic Veterans, et al., at 8–9.)

IR Claimants effectively have access to neither counsel nor trained service representatives. As the District Court found, even though service representatives perform a valuable service with respect to SCDD claims in general, they cannot provide an adequate safeguard for IR Claimants. (App. 133–35.) As amicus notes, veterans service organizations which handle other types of SCDD claims do not accept IR Claims. (Brief of Amicus Curiae Swords to Plowshares at 4–5.) Thus, the "serious problem" noted by Chief Judge Nebeker with respect to SCDD claims in general is endemic to the IR Claims-handling process.

3. The government continues to assert a legislative purpose for the fee limitation which is unsupported. As this Court recognized, Congress enacted the fee limitation ostensibly to prevent attorneys' fees from reducing the amount of veterans' benefits received by the claimant. Congress did not enact the fee limitation to preserve the informality of proceedings, as the government argues. (Opp. at 3.) In any event, as the District Court found, after passage of the VJRA in 1988, there is no rational reason for retaining the fee limitation only as to IR Claimants. (App. 141.)[6]

4. Contrary to this Court's teaching on the appropriate use of legislative history, the Ninth Circuit relied on Senate and House Committee Reports concerning proposed bills which were never enacted and which differ significantly from the VJRA as passed. Worse, the Ninth Circuit gave more weight to those Reports' purported findings concerning veterans' benefits generally than it did to the District Court's fact findings concerning IR Claims. Consequently, the government devotes one-third of its argument to an elaborate defense of the Ninth Circuit's novel approach. (Opp. at 16–19.) The government's arguments confirm that the Ninth Circuit has used legislative history improperly to justify its result.

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[6] Moreover, whether or not the VJRA is a "compromise agreement," as the government asserts (Opp. at 18), is beside the point. By definition, IR Claimants are not covered by the VJRA.

The Ninth Circuit ignored a specific congressional finding that IR Claims are "significantly different" from other SCDD claims. Pub. L. 98-542 § 2 (12). The government rationalizes this disregard of the only congressional finding explicitly addressing IR Claims by speculating that by passing the Veteran's Dioxin and Radiation Exposure Act of 1984, Congress intended to provide IR Claimants with fewer procedural protections than other classes of SCDD claimants. (Opp. at 17.) Nothing in either the 1984 Act or the VJRA supports such a notion.

The government also argues that the 1984 Act required "the DVA to provide additional guidance to its claims officers who investigate and rule upon IR Claims." (Opp. at 17.) The government's argument does not advance its cause. The District Court's fact findings show that, despite the 1984 Act, the DVA procedures are seriously deficient, and denial of access to lawyers violates due process. (*See* App. 116–119, 130.)

5. Notwithstanding the history of this litigation and the large number of veterans who are affected, the government continues to attempt to minimize its significance. In a lengthy footnote, which has no support in the record, the government disingenuously seeks to reduce the size of the certified class. The government concedes that the class consists of at least 15,417 members, but argues based on a series of unsupported assumptions that the fee limitation actually affects only 576 persons. (Opp. at 11 n.2.)

The government's argument rests on a series of false factual premises. The government begins by asserting without record support that only 4,856 IR Claimants asked the DVA to determine whether they were eligible for readjudication of their claims. The government's assertion, even if accurate, ignores the fact that many claimants may not have received notice of their right to request readjudication, or that the pendency of this appeal may have deterred claimants from pursuing that right.[7]

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[7] Should this Court reverse, petitioners intend to ask the District Court to amend its judgment to permit additional requests for readjudication.

The government then cuts that figure nearly in half, to 2,743, based on the DVA's determination of eligibility. Given the DVA's abominable error rate and the adversarial nature of its proceedings, it would be ironic if the government's self-serving determination of eligibility were used to deny review by this Court.

The final reduction to 576 is based on the government's unilateral action in "suspend[ing] readjudication of IR Claims in light of the court of appeals' decision." (Opp. 11 n.2.) By that logic, had the government acted to suspend readjudications sooner, the class of affected claimants would have been reduced to zero.[8]

But even assuming the government has correctly characterized the size of the class, this Court has never held that a due process violation is constitutionally insignificant merely because it affects only a small number of individuals. To the contrary, Justice O'Connor specifically noted in *Walters* that on remand, the District Court "should consider any individual claim" that the fee limitation violates procedural due process. (App. 55.) The certified class of IR Claimants is due no less.

6. Finally, the government fails to address why petitioners' claims of First Amendment violations should be analyzed, as they were by the Ninth Circuit, under a standard more lenient than traditional First Amendment scrutiny. In choosing to sidestep the substance of petitioners' First Amendment arguments, the government misses two critical points.

First, the government has never contested that the fee limitation restricts First Amendment freedoms. The

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[8] The government does not help its position by arguing that "it should be kept in mind" that IR Claimants fall outside the categories of presumptive eligibility for benefits that Congress created for radiation exposure. (Opp. at 11 n.2.) As the District Court found, the point of petitioners' due process challenge is that IR Claimants have erroneously been denied benefits. (App. 101.) That 49% of IR Claimants do not fall within the categories of presumptive eligibility simply means that their cases are especially difficult. Consequently, their need for lawyers is especially acute.

government's assertion that this Court previously "rejected" petitioners' First Amendment claims (Opp. at 18) must itself be rejected to the extent that it obliquely argues that the First Amendment is not implicated by the fee limitation. Neither this Court, nor the Ninth Circuit, nor the government itself has ever so indicated.

Second, the government ignores two opinions issued by this Court after *Walters*, each of which seriously undermines the government's position. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Meyer v. Grant*, 486 U.S. 414 (1990). Both *Riley* and *Meyer* hold that any government restriction on an individual's ability to hire assistance in the exercise of First Amendment freedoms must be narrowly tailored to serve a compelling government interest. *Riley*, 487 U.S. at 789 n.5; *Meyer*, 486 U.S. at 424. As if *Riley* and *Meyer* did not exist, the government argues that the First Amendment is satisfied unless the fee limitation forecloses any opportunity to make a "meaningful presentation of IR Claims." (Opp. at 18–19.) This standard was expressly disapproved in *Meyer* and contradicts decades of this Court's distinct treatment of First Amendment claims. Review by this Court is therefore warranted.

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